INSTITUTES OF THE LAW OF SCOTLAND.

By Sir GEORGE MACKENZIE of Roſehaugh, *Advocate to K.* CHA. II. *and to K.* JA. VII.

The Seventh Edition.

Reviſed, and Corrected by ALEXANDER BAYNE J. M. P.

WITH

Notes explaining ſome difficult Places, and ſhewing in what POINTS the LAW has been altered, by late Acts of PARLIAMENT, and by DECISIONS, in the SESSION.

WITH

A large and exact Index of the whole Contents.

1776

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To the Right Honourable

JAMES

Earl of *Bute*, Viſcount of *Kingarth*, Lord *Mount-ſtewart*, *Cumbra*, and *Inchmarnoch*, &c.

Heritable Sheriff of the Shire of *Bute*, &c.

Grandſon to the AUTHOR of theſe INSTITUTIONS, by his eldeſt Daughter,

Dame *AGNES MACKENZIE*:

AND ALSO

To the much Honoured

GEORGE MACKENZIE of *Royſtoun* younger, Eſq;

Only Son of Sir *JAMES MACKENZIE* of *Royſtoun*, one of the Senators of the College of Juſtice, and one of the Five Lords of Juſticary for *North-Britain* or *Scotland*,

The

The other Grandson of the Author, by his youngest Daughter.

Dame *ELIZABETH*,

This NEW EDITION, corrected and augmented with NOTES, is humbly Dedicated and Presented by the Publisher,

My Noble LORD,

and Honoured SIR,

Your most humble

and obedient Servant,

J. SPOTISWOOD.

16 JY 60

THE

The Publisher to the READER.

TO preserve this Monument of that worthy Gentleman Sir George Mackenzie, from mouldering into Dust, and that this Book of Institutions, which has been these many Years past, most acceptable to all, might not be thrown aside into a Corner amongst others, which treat of obsolete and useless Laws, it was thought proper to Revise it: And in order to make the Book run another Course of Prescription, to put in it new Furniture, by adding Notes, pointing at these Statutes, which make an Addition or Alteration of our Law, since the Author put his last Hand to the Work, in the Year 1688. The Reader will find some Observations, that look rather like to a Commentary, than short Notes, to which the Publisher was driven, by following the Vestige of the Author, or Authors of the Notes subjoined to a former Edition of the Book, which, because they deserve a better Fate than Oblivion and Neglect, are therefore insert, and others added to them.

In the mean Time, the Publisher proposed to keep close to the Scheme laid down by the Author, and the Succinctness of his Method: For, whatever he himself might have done towards altering the Form of his Book, cannot be usurped by another; so that the Notes express, for the most Part, the late Changes,

and

and the present State of the Laws of Scotland, without impairing the Author's Fabrick.

Albeit, it may be thought, that Sir George, *if living at this Time, would have made more bold Changes in the Order and Method; for his second Edition in the* 1688, *did set forth the new Laws and Acts made in the two Sessions of Parliament, in the Years* 1685, *and* 1686, *besides some Corrections,* (*as he tells in his Preface to that Edition, of which all others printed since, are but Copies;*) *the Difference, nevertheless, is, That the Author would have engrossed them into the Body of the Book, which the Publisher had no Right to do, otherways than by the Way of Noteing.*

16 JY 60

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James Moffat

THE INSTITUTIONS Of the Law of SCOTLAND.

BOOK I.

TIT. I.

Of LAWS in General.

1. JUSTICE, *is a constant and perpetual Will, and Inclination to give every Man what is due to him.*

2. LAW is the *Science*, which teaches us to do *Justice*.

3. THIS Law, in a large Acceptation, is divided into the Law of *Nature*, Law of *Nations*, and the *Civil* and *Municipal* Law of each particular Country.

A THE

Book I.

4. The *Law of Nature* comprehends those *Dictates* which *Nature* has taught [illegible] Instances whereof are *Self-defence*, *Education of Children*, and, generally, all *those common Principles, which are common to Man and Beasts; and this is* rather *innate Instinct*, than *positive Law.*

Law of Nations.

5. The *Law of Nations* is peculiar to *Mankind only, dictated by right Reason*, and is divided into the *Original* and *primary Law of Nature*, that *flows* from the *first* and *purest Principles* of *right Reason*; such as *Reverence* to GOD, *Respect to our Country*, and *Parents*. And the *secondary*, and *consequential Law of Nature, consisting of these general Conclusions, in which ordinarly all Nations agree*, and which they draw by way of necessary Consequence, *from those first Principles*. And under this Part of the Law of Nations, are comprehended, the *Obligations* arising from *Promises*, or *Contracts*; the *Liberties* of *Commerce*, the *Ransoming* of *Prisoners*, *Security* of *Ambassadors*, and the like.

Municipal Law.

6. Civil or *Municipal Laws, are the particular Laws and Customs of every Nation*, or *People, who are under one Sovereign Power.*

Roman Law.

7. The *Romans* having studied with great Exactness the Principles of Equity and Justice, their Emperor *Justinian* did digest all their Laws into one Body, which is now called by most polite Nations

tions (for its *Excellency*) the *Civil Law*: and as this Civil Law is much respected generally, so it has great Influence in *Scotland*, except where our own express Laws or Customs have receded from it. And by the common Law in our Acts of Parliament is meant the † *Civil Law*.

8. The *Popes of* Rome, in Imitation of the *Civil Law*, made a Body of Law of their own; which, because it was compiled by Churchmen, was called *The Canon Law* *: And though it has here no positive Authority, as being compiled by private Persons, at the Desire of the Popes, especially since the Reformation; yet our *Ecclesiastick Rights* were settled thereby before the Reformation: And because many Things in that *Law*, were founded upon *Material Justice*, and exactly calculated for all Churchmen; therefore that Law is yet much respected among us, especially in what relates to *Conscience* and *Ecclesiastick Rights*.

9. Our *Municipal Law* of *Scotland* is made up partly of our *written*, and partly of our *unwritten Law*: Our *written Law* comprehends, First, our *Statutory Law*, which consists of our *Statutes* or *Acts of Parliament* (z). *Secundo*, The *Acts of Se-*

A 2 *natus*,

* Tit. I. Par. 8. Act 131.
† K. Ja. IV. Act 51. K. Ja. V. Act 80. Q. Mary Act 22. K. Ja. VI. Par. 1. Act 31.
* Canon Law.

Municipal Law of *Scotland*.

(z) In making Acts of Parliament, The three Estates have the Power deliberative, or consultative, and the Sovereign hath the Power decisive, which

Book I. derunt which are *Statutes made by* the *Lords* of *Session*, by *virtue of a particular Act of Parliament*, * *impowering them to make such Constitutions as they shall think fit*, for ordering the *Procedure* and *Forms* of *Administrating Justice*, and these are called, *Acts of Sederunt*; because they are made by the Lords *sitting in Judgment*, but are not properly Laws, the *Legislative Power* being the *King's Prerogative*. *Tertio*, The Books of *Regiam Majestatem*, which are generally looked upon as a Part of our Law; which, with the *Leges Burgorum*, (*b*) and

* Acts of Parliament Acts of Sederunt K. Ja. V. Act 93.

Regiam Majestatem.

which consists in admitting or rejecting the Act. Now, in the Concourse and Consorting of these two Powers, lyeth the Cause effecient of a Statute; so that neither the Estates alone, nor the King alone, can make a Law. And seeing the decisive Power is more noble than the deliberative, and that the King is the Head of the Commonwealth, or Society, the Author's Position, *That the Legislative Power is the King's Prerogative*, may pass without Censure.

(*b*) The Author in his Observ. on Act 54. P. 1425. infers, That, because the Books of *Reg. Majest.* & *Quon. Attach.* are in that Act called *The Books of Law*: Therefore they are our Law. Now, there's no mention of any other than of these two Treatises. Whence it is argued, That none of the flying Books, either in Manuscript at that Time, and since subjoin'd to the printed Copy of the *Regiam Majestatem*, can be reckon'd our Law. But again, upon the Act 115. P. 1487. (which is a Commission to four of each Estate, to advise concerning the reducing

and the other Tractates joined by Skene to them, are called, *The Old Books of our Law*, by many expreſs Acts of Parliament *. Though the Book of *Regiam Majeſtatem*, were originally but the Work of one private Lawyer, writing by way of Inſtitution, and are now very much abrogated by Cuſtom.

* K. Ja. I. Act 54. K. Ja. III. Act 115.

10. OUR unwritten Law, comprehends *the conſtant Tract of Deciſions, paſt by the* Lords of Seſſion, which are conſidered as Law; the Lords reſpecting very much their own Deciſions (*c*); and though they may, yet they uſe not to recede from them, except upon *grave Conſiderations*. *Secundo*, Our *Ancient Cuſtoms*, make

Unwritten Law.

reducing to one Volume, the Laws that were to be authoriſed, and deſtroying the reſt.) The Author obſerves, That *Regiam Majeſtatem* is expreſly therein-mentioned, as one of our Law-Books. And adds, That he knows not any Meaning theſe Words in that Statute, *Acts, Statutes and other Books*, can have, unleſs we thereby underſtand, the Burrow-Laws, the Statutes of the Guildry, and other Books ſubjoined to the printed *Regiam Majeſtatem*; ſo that our Author's calling the *Leges Burgorum* and other Tractates joined by *Skene*, the *Old Books of our Law*, ought not to be quarrelled.

(*c*) The Deciſions here pointed at, are ſuch, as find and declare what is Cuſtom; for theſe Deciſions which interpret or illuſtrate, extend or reſtrict the Acts of Parliament, ought to be reckoned a Part of our written Law.

Part of our *Unwritten Law*, which have been universally received among us. The *tacite Consent* of *King* and *People* operating as much in these, as *their expres Concurse* does in making Laws; And such is the Force of Custom or Consuetude, that if a Statute, after long standing, has never been in Observance, or having been has run into Desuetude, *Consuetude* prevails over the *Statute*, till it be renewed, either by a *succeeding Parliament*, or by a *Proclamation from the Council*; For though the Council *cannot make Laws*, yet they *may revive them* (d).

Declaratory Law. Some Laws are called *Declaratory*, because *they do not introduce any new Law, but declare what formerly was Law*; and these may *look backward* (that is to say) *Cases even Prior to the Statute may be reguarded by them*, though generally *Laws look forward*, and regulate only future Cases.

2. Laws

(d) The Author of the Notes subjoin'd to some former Editions of this Book, doubts, if the King's Privy Council had the Power given to them by our Author, *i. e.* to revive Statutes running into Desuetude. In Vindication of that Position, it is to be noticed, That the so doing is a Branch of the gubernative Power of the Sovereign, which he did exercs with Advice of his Council, and whatever they thought proper for the Welfare of the Subject, was by them enacted in Virtue of their Commission, and was issued out or published in Name of the Sovereign.

12. LAWS should Command, not Perswade; and though the *Rubrick* (or Title) and *Narrative of the Statute*, may direct a doubting Judge; yet, if the Statutory Words be clear, they should be followed in all Cases.

13. ALL Laws should be so interpreted, as to evite Absurdities, and as may best agree with the Mind of the *Legislator*, and *Analogy*, or general Design of the Common Law.

14. CORRECTORY *Laws* (so we call these which *abrogate* or *restrict former Laws*) *are to be strictly interpreted, for we should recede as little as can be from received Laws.* Corrective Laws.

15. FAVOURABLE *Laws* are to be extended, and the *parity of Reason* often prevails with our Judges to extend Laws to Cases that are founded on the same Reason with what is expresly determined by the Statute (*e*). Favourable Laws.

(*e*) Lawyers say, *Favor non est nomen juris*, and in Law, *Non datur casus pro amico*, wherethrough, of the Division of several Kinds of Laws, this Member of *Favourable Law* may seem improper. But the Reader is to notice, the Author had in View, the various Sorts of Interpretation of Laws: And for illustrating this and the Sections preceding, it is fit to know, That

The Law being of itself a dead Letter, must, upon Occasion, be applied by Men authorised for that End: neither can any Law comprehend all Cases: Wherefore, and because of the different Sense and Meaning of Words, Interpretation is necessary. Now, Interpretation is either Au-

Authentick or Authoritative, and of equal Force with the Law it self; As when it is applied and expounded by the Legislator himself; or it is Consuetudinary, when the Signification and Design of the Law is taken from the Customs of the People, or from the Manner of observing it, and is equally binding with an unwritten Law: Or the Interpretation is Doctrinal, which is made by the Judges and others learned in the Law, declaring the Mind of the Legislator, and that is done, by attending to the Propriety of the Words, or noticing the Circumstances in explaining the Law, and the eto apply ing the Case in Hand by a discursive or subtile Ratiocination. This last Kind of Interpretation is of no ayail, except it be Analogous to the Law it self. Again, this Doctrinal Interpretation, is either Declaratory, which is a fit and convenient Explication, when there is Obscurity in a Word, in a Sentence, or in the whole Tenor of the Law, for several Words are equivocal, and have many Significations; so that the proper is to be preferred to the improper, except the common Use of speaking perswade the contrary. Or, *Secondly*, The Interpretation is extensive, which applies the Law to Cases, other than these expresst by the Words of it, yet nevertheless implied and supposed to be contain'd in the Intention and Meaning of the Legislator. This is gathered from other Laws, or other Parts of the same Law. *2dly*, From a contrary Sense. *3dly*, By a Consequental Reasoning, as when a Thing is prohibited, every Thing that follows that, is also forbidden. *4thly*, From the Reason which induced the Legislator to make the Law, which gives Rise to the common Saying, *Ubi eadem est ratio, ibi eadem jus*, where there is Parity of Reason, there ought to be Parity of Decision. *5thly*, From Equity, Extension is likewise to be made

An-

in favourable Cases, as in those which concern Religion, Utility and Benefit of the Commonwealth, such as relate to Testaments and the like. The last Interpretation Doctrinal is restrictive, which is, when the Legislator expresses himself in general Terms, when at the same time he intended less than the Words do import, which may be gathered from the abovementioned Notes and Marks; but especially from the Reason of the Law. Hence comes the saying, *Cessante Legis ratione, cessat ejus dispositio*, That is, when the Reason and Motive of the Law ceaseth, the Ordinance and Disposal of Matters thereby ought not to take place. This restrictive Interpretation is made Use of in odious Cases. Tit. 2.

That which is contrary to the establishing and confirming of Laws, is *Correction*, which, as much as is possible, ought to be shunned. A Law is said to be *abrogated*, when it is wholly taken away; to be *derogated* from, when only a part of it is made null; *subrogated*, when some Thing is added to a former Law, *obrogated*, when something in the former Law is altered or changed.

TIT. II.

Of Jurisdiction and Judges in General.

Jurisdiction of Judges.

HAVING resolved to follow *Justinian*'s Method, (to the End there may be as little Difference found betwixt the Civil Law and ours, as is possible; and that the Reader may not be distracted by different Methods) I do resolve, First, to lay down what concerns the Persons of Juris-

Objects of Juris-

whom

Book II. whom the Law treats. *Secundo*, What concerns the Things themselves treated of, such as *Rights*, *Obligations*, &c. *Tertio*, The *Actions whereby these Rights are pursued*, which answers to the *Civilians* Objecta juris, *viz.* Persons, Res, & Actiones.

Persons Civil and Ecclesiastick.

2. The *Persons* treated of in Law, are either *Civil* or *Ecclesiastick*, the Chief of both which in a legal Sense are *Judges*, with whom we shall begin. And for the better understanding of their Office, it is fit to know, that *Jurisdiction is a Power granted to a Magistrate to cognosce upon, and determine in Cases, and to put the Sentence or Decreet to Execution, in such Manner as either his Commission, Law, or Practice does allow.*

K. C. II. Par. 1. Act 2. Par. 3. Act 10.

3. All *Jurisdiction flows originally from the King* (a), so that none have Power to made *Deputes*, except it be contain'd in their *Commission*; and if a *Depute* appoint any under him, that *Sub-Depute* is called properly

(a) The Remark, which the Author of the Notes makes upon this Section, is out of the Way, because, our Author's View was upon the Source and Foundation of Jurisdiction, and at the first Constitution of Government, when civil Societies came to be settled, at which Time, (as it is not to be doubted) all Jurisdiction was, in an eminent manner, lodged in the Monarch, who thereafter, for Conveniency to himself, and for the greater Good to his People, did communicate of this Jurisdiction to others, which is clearly exemplify'd in *Exod.* xviii. *ver.* 13, ——— 26. Further,

properly a *Substitute*; and every Judge is answerable for the *Malversation* of his *Depute*.

4. JURISDICTION is either *Cumulative*, or *Privative*; *Cumulative Jurisdiction is, when two Judges have Power to judge the same Thing*: And, generally, it is to be remembred, that the King is never so denuded, but that he retains an inherent *Power to make other Judges with the same Power that he gave in former* *Commissions*: And thus he may erect Lands in a *Regality*, within the Bounds of an *heretable Sheriff-ship, and Burghs Royal*, within the Bounds of a *Regality*; and these Bounds within which a Judge may exerce his Jurisdiction, are called his *Territory*; so that if any Judge *exercise Jurisdiction without his Territory*, his Sentence is null; and among these who have a *Cumulative Jurisdiction* he who first cites, can only judge; and this is called *Jus Præventionis*. Jurisdiction Cumulative and Privative.

*K. C. II. Parl. 3. Act 18.

5. PRIVATIVE *Jurisdiction* is, when one *Judge has the sole Power of Judging, exclusive of all others*; such Power have the Lords of *Session* in judging *Declarators of Property*

ther, tho' the two Acts of Parliament, cited for astructing the Position to be our Municipall Law, whereof the last is more expres) be rescinded; yet at the Time our Author wrote, they were standing Laws, and even at this Day, the present Exercise of the Royal Power, is but different from what it was in former Times.

by, *Actions of proving the Tenor, Cessiones Bonorum*, &c. (*b*)

6. JURISDICTION *is founded to any Judge*, either because, the Defender *dwells within his Territory* which is called, *Sortiri forum ratione domicilii*: Or, *Secundo*, Because the *Crime was committed within his Territory*, which is called *Ratione Delicti*: Or, *Tertio*, If the Person Pursued, have any immoveable Estate within his *Territory*, though he live not within the same, he may be pursued by *any Action to affect that Estate*, which is called *sortiri forum ratione rei sitæ*. (*c*)

7. *A.*

(*b*) The Author of the Notes goes further in his Remark, than our Author intended in the Section it self, which contains true Doctrine. But for setting this Matter in a clear Light, it is to be noticed, tho' the Lords of Session have an universal Civil Jurisdiction, yet they are not, in all Causes Judges competent, in the first Instance, for, (without mentioning other Cases) no Action for Sums below 200 Merks, can be pursued before them, nor advocated even upon a Reason of Iniquity. Wherethrough inferior Courts, have a Kind of privative Jurisdiction exclusive of the Session; and, with respect to the Parliament, no Process can be originally raised before it, and no Action can begin at that Court, who only cognosces upon the Procedure of the subaltern Judicatories, upon a Petition, or in a Process of Reduction, and gives Redress to any Party injustly lesed.

(*c*) There are several other Grounds of Jurisdiction, such as, *ratione contractus*, and *propter connexitatem Causæ*, &c. But seeing our Author has not noticed them, we forbear.

Tit. 2. Prorogate Jurisdiction.

7. *A Jurisdiction is said to be prorogate, when a Person not otherways subject, submits himself to it, as, when he compears before an incompetent Judge, and propones Defences*(d)

8. All Judges with us must take the *Oath of Allegiance*, *and the *Test*, † whereby they swear *to maintain the Government of Church and State, as it is now established*; and an *Oath de fideli administratione*, before they exerce their Office: And no *excommunicate Person, nor Rebel against the Government*, can judge by our Law.(e)

*K. C. II. Parl. 1. Sess. 1. Act 11.
†Par. 3. Act 18.

9. It

(d) Our Author's Expression must be taken in its proper Meaning, *i. e.* the Defences, to be propon'd, must be *in Causa*, either dilatory or peremptory, but not declinatory; so that the Censure on this § is not to the Purpose.

(e) The external necessary Qualifications of a Judge are pointed at, according to the Laws in Force, in the Year 1684, and 1688, which are now partly rescinded, and alter'd by others ordering new Qualifications, as our Governours have, from Time to Time, thought fit. The present Qualifications are, a Judge must be of Age required by Law, which in Inferior Judges is 21, and in the Lords of Session Ordinary or Extraordinary, 25 Years. 2. He must be Protestant. 3. Not a Rebel against God and his Church, *i. e.* excommunicate, or Rebel against the King. 4. He must take the *Oaths* appointed by the Parliament, as the Oath of *Allegiance*, the Oath of *Supremacy*, the Oath of *Abjuration*, and the *Assurance*. And moreover, which is never alter'd or dispensed with, he must take the Oath *de fideli Administratione*.

Advocation of Causes.

9. If a Person be pursued before a Judge who is not competent, he may complain to the *Lords of Session*, and they will grant *Letters of Advocation*, whereby they *advocate*; that is to say, *call that Cause from the incompetent Judge to themselves*: And if after the *Letters of Advocation* are intimated to that Judge, he yet proceed, his Decreet will be null, as given *Spreto Mandato*. (f)

Division of Jurisdictions.

10. JURISDICTION is either *supreme, inferior, or mixt*: These Courts are properly called, *Supreme* from which *there is no Appeal to any higher Judicatory*, such as the *Parliament, Privy Council, Lords of Session*, the *Criminal Court, and Exchequer*, (g) Supreme Courts. Infe-

(f) There are only two Reasons of Advocation, namely, Incompetency of the Court, or of the Judge. 2. Iniquity. See *Spotiswood's* Form of Process. Tit. 1. of Advocations.

The Inferior Judge, for his Contempt of the Authority of the Lords of Session, may be punished by a temporary Imprisonment, or by Fine, or by both, as the Lords, who are, in this Behalf, Judges competent, shall think fit.

(g) The Privy Council, the Session, the Justiciary, the Exchequer, are, in their own Kind, Supreme Courts, tho' not so properly as the High Court of Parliament, in whom lies the last Resort, or Act of Judicature. Now it is to be observed, That before the Union of the two Crowns, the Judicative Power was lodged in the three Estates only, who by themselves alone, determined Causes brought before them, without Necessity of a Concurrence from the Sovereign. And that since the Union, tho' the Parliament of

Tit. 2.
Inferior Courts

Inferior Judges are such, *whose Decrees and Sentences are liable to the Reviews of the Supreme Courts*, as *Sheriffs, Stewards, Lords of Regality, Inferior Admirals* and *Commissars, Magistrates of Burghs-Royal, Barons*, and *Justices of Peace. Mixt Jurisdiction participates of the Nature*, both of the *Supreme* and *Inferior Courts*; such a Jurisdiction have the *High Admiral* and *Commissars of Edinburgh*. Both which are in so far *Supreme*, that *Maritime Affairs*, and *Confirmations* of *Testaments*, must come in and be tabled before the *High Admiral* and *Commissars of Edinburgh*, in the *first Instance*. As also, they both can reduce the Decreets of *Inferior Admirals* and *Commissars*: But seeing their Decreets are subject to the Review of the Lords of Session, they are in so far Inferior Courts.

11. No of *Britain* is compoled, 1. Of the Sovereign. 2. Of the Houſe of Peers. 3. Of the House of Commons: yet nevertheleſs, the Judicative Power, belongs ſolely to the Lords Spiritual and Temporal in Parliament aſſembled.

The Order of Procedure, which was obſerved in bringing Proceſſes before the Parliament of *Scotland*, and is now to be done in laying Grievances before the Houſe of Peers, Is to be found in *Spotiswood*'s Form of Proceſs. Tit 4.

The Meaning of *firſt Inſtance*, and of *ſecond Inſtance*, is ſet down in *Spotiſw*. Notes on *Hope*'s *Minor Practicks*. Tit. 1. § 23.

The Lords of Seſſion, review the Sentences delivered, as Decreets of inferior Judges, in the 2d Inſtance, i. e. either in a Suſpenſion, or in a Proceſs of Reduction.

Book I.

11. No inferior Judges can judge in the Causes of such as are *Cousin germans* to him, or of a nearer Degree, either of *Affinity* or *Consanguinity*: But the *Lords of Session*, *Lords of Privy Council*, *Lords of Exchequer*, and the *Lords Commissioners of Justiciary*, can be declined in no Causes, other than these belonging to their * *Father* or *Mother*, *Brother* or *Sister*, *Son* or *Daughter*, *Nephew* or *Nice*, *Uncle* or *Aunt*, whether they stand in the Line of † *Affinity*, or of *Consanguinity* *.

*K. J. VI. Par. 1°. Act 212.
†K. C. II. Par. 3. Act 13.

Privilege of the College of Justice

12. THE Members of the *College of Justice* have this Privilege, that they cannot be pursued before any inferior Judge; and if they be, the Lords will advocate the Cause to themselves. [b] No Cause within

* 11. No Inferior Judge can give Judgment in the Causes of such as are related to him by Affinity or Consanguinity in a nearer Degree than that of Cousin German: But so much Trust was reposed in the Lords of Session, That they could only be declined in the Causes of their Father, Brother and Son; which by a late Statute is extended to the like Degrees of Affinity, and to the Relation of Uncle and Nephew in Consanguinity. Which Reasons of Declinature, are thereby also extended to the Lords of Privy Council and Exchequer, Commissioners of Justiciary, and to all other Judges within the Kingdom.

(b) The Persons, who are properly Members of the College of Justice, and others, who have the Privilege of such, are designed by an Act of Sederunt, in Feb. 1687. which, with the several Privileges themselves, is set down in the End of the present State of the College of Justice, prefixed to *Spotiswood's* Form of Process.

in 200 Merks, is to be advocated to the Lords from the Judge competent. † (*i*)

†K. C. II. Parl. 1. Sess. 3. Act 9.

TIT. III.

Of the Supreme Judges, and Courts of Scotland.

THE *King* is the *Author* and *Fountain* of all Power, and is an *absolute Prince, having as much Power, as any King or Potentate whatsoever, * deriving his Power from GOD Almighty alone* †, *and so not from the People.* The special Privileges that he has, are called, *His Prerogative Royal*; such as, that he only can make *Peace* or *War*, call *Parliaments, Conventions, Convocations* of the *Clergy*, make Laws §: And generally, all Meetings called without his special Command are punishable ¶: He only can remit Crimes, legitimate Bastards, name Judges and Counsellors, give Tutors Dative, and naturalize Strangers, and is *Supreme over all Persons, and in all Causes, as well Ecclesiastick as Civil**.

*K. J. VI. Par. 15. Act 251. †K. C. II. Par. 1. Sess. 1. Act 5. and 15. Par. 3. Act 2. §Acts 3. & 11. Par. 1. Ch. II. ¶K. C. II. Par. 1. Sess. 1. Act 2. *K. J. VI. Par. 18. Act 1.

2 THE Parliament of old, was only the King's *Baron Court*, in which all Freeholders were obliged to give Suit and Presence, in the same Manner, that Men

K. C. I. Par. 1. Act 5. K. Ch. II. Par. 2. Sess. 1. Act 1.

(*i*) Whoever hath a Benefit of Exemption, must compear before the Court, and plead upon it.

Such Causes cannot be advocated from the competent inferior Court, even upon Reasons of manifest Iniquity. *Act* 9. *Parl.* 1663. But this is in some Part of it derogated from, by §. 16. and 17. of the *Act* 16. *Parl.* 1672. concerning the Regulations of the Session.

appear yet at other Head Courts; And therefore, since we had Kings before we had Parliaments, it is evident, that the King's Power flowed not from them.

3. The Parliament is called by Proclamation now on Forty Days (*a*), though it may be adjourned by Proclamation on twenty Days preceeding the prefix'd Day, at which it should have met; but of old, it was called by *Brieves* out of the *Chancellary*. It consists of *three Estates* (*b*), viz. the *Arch-Bishops*, and *Bishops*; and, before the Reformation, all *Abbots* and *Mitred Priors* sat as *Church-men*. *Secondo*, The *Barons*,

(*a*) The Parliament of *Great-Britain* is called on 50 Days at least. The Adjournments for which, there's no Number of Days settled, are in the Interval of Sessions, made at the Pleasure of the Sovereign, and, during the Sitting of the Parliament, depend on the respective Houses.

(*b*) It seems, the *Model* of our Constitution has been borrowed from *France*, where, this Word *Estates*, signifies, as with us, the three different Orders of the Kingdom, assembled to give Advice and Assistance to the Sovereign, for rectifying Abuses in the Government: These Estates are, the Clergy, the Barons, (whom the *French* call *la Noblesse*) and the Burgesses, (called in *France*, *Le tiers Estat.*) Now, because none of the Clergy, other than these endowed with Church Dignities, and possessed of great Fortunes, were allowed to come to these General Meetings; It may be thought, that they sat there, not as Spiritual Men, but as Freeholders of large Revenues, able to bear a good Share of the Burdens to be laid on the Subjects. In the Times, when *Episco-*

rons, in which Eſtate are comprehended all *Dukes*, *Marqueſſes*, *Earls*, *Viſcounts*, *Lords*, and the *Commiſſioners* for the Shires: For of old, all Barons who held of the King did come; but the Eſtates of leſſer Barons not being able to defray this Charge, they were allowed to ſend Commiſſioners for every Shire: * And generally, every Shire ſends two (*o*), who have their Charges born by the Shire. *Tertio*, The *Commiſſioners for Burghs Royal*, each whereof is allowed

*K. J. I. Act 101. K. J. VI. Par. 11, Act 311.

B 2

Epiſcopacy was aboliſhed, our Rulers ſtill kept the Denomination of three Eſtates, which they made up thus. 1. The Nobility, or greater Barons, *i. e.* Dukes, Marqueſſes, Earls, Viſcounts, Lords. 2. The Commiſſioners of Shires, or the leſſer Barons; 3. The Burgeſſes, or Commiſſioners from Burghs. *Act* 1. *Parl.* 1689. *Act* 3. *Parl. May* 1690.

(*o*) Since the Revolution, by *Act* 11. *Parl.* in *June* 1690. there's an Additional Repreſentation given to the larger Shires of *Scotland*: But, by an Article of the Union of the two Kingdoms, in the Year 1707, our Repreſentation comes to a very ſmall Number. The firſt Eſtate of Nobility, whereof there is 10 Dukes, 3 Marqueſſes, 74 Earls, 18 Viſcounts, 45 Lords, in all 150, conſiſts of 16 Peers elected; The Barons, which in 1707, were 90, are repreſented by 30. And the Burgeſſes, which were in Number 67, have no more Repreſentatives than 15. By which Settlement, *North-Britain* or *Scotland*, whoſe Parliament conſiſted of 307 Members, beſides the Officers of State, and 14 Biſhops, is now repreſented by 61, *hinc illæ Lachrymæ*. For further Knowledge herein, ſee *Spotiſwood's Law of Elections* laſt Edition, 1722.

lowed one, and the Town of *Edinburgh* two. Though all the three Eſtates muſt be cited, yet the Parliament may proceed, albeit any one Eſtate were abſent, or being preſent, would diſaſſent. The *Legiſlative Power is only in the King, and the Eſtates of Parliament only conſent*; and, in Parliament, *the King has a negative Voice, whereby he may not only hinder any Act to paſs, but even any Overtures to be firſt debated there.* The Acts of Parliament muſt be proclaimed upon Forty Days, that the *Lieges* may know them; and till theſe 40 Days elapſe, they are not binding † *(d)*

†K. J. VI. Par. 7. Act 128.

4. To ſecure the Crown againſt Factions, and impertinent Overtures in open Parliament, our Parliaments chooſe, before they proceed to any Buſineſs, *eight* out of each *State*, who, with the *Officers of State*, determine what Laws or *Overtures* are to be brought in to the Parliament; and they are therefore called, *The Lords of Articles*: And are choſen in Manner following, *Firſt*, The whole Biſhops go by themſelves, and the Nobility by themſelves; and the Clergy

Lords of the Articles.

(d) The Acts of the Parliament of *Great-Britain* (as thoſe paſt formerly in the Parliament of *England*) are not proclaimed: For, when enacted and approven by the Lords, the Law preſumes, That the whole Body of the People get, from their Repreſentatives, Notification of every Thing that paſſes in the Parliament; and from that Time, without further Publication, they become binding.

gy make Choice of eight Noblemen, and the Noblemen make Choice of eight Biſhops, and then both Clergy and Nobility meet together, and make Choice of eight Barons, and eight Burgeſſes; which Election being reported to the Parliament, it is by them approven: And then the Commiſſioner adds to them *the whole Officers of State** (e) Tit. 3. * K. C. II. Par 1. Seſſ. 3. Act. 1.

5. We have another Meeting of the *three Eſtates*, called, *The Convention of Eſtates*; which is now called upon twenty Days, and proceeds in the ſame Way that the Parliament does, differing only from it, in that the Parliament can both impoſe Taxations, and make Laws; whereas, the *Convention of Eſtates* can only impoſe, or rather offer Taxations, and make Statutes for upliſting thoſe particular Taxations, but can make no Laws. And of old, I find by the *Regiſters* of the *Conventions*, (the eldeſt whereof now extent, is in *Anno* 1583.) that the *Convention of Eſtates conſiſted of any Number of the three Eſtates, called off the Streets ſummarily by the King*; and yet they cried down or up Money, Conventi-on of Eſtates

(e) The Committee of Parliament, called the Articles, have been conſtituted by a Cuſtom, of the Beginning whereof there's no Memory, the rebellious Parliament interrupted it, and in Place thereof, by their Act Parl. introduced Committees. At the Reſtoration, it was, by Act 1. Parl. 1663. renewed. But, by Act 3. Parl in *May* 1690. again abrogated; and in Place thereof were eſtabliſhed Committees of what Number the Eſtates ſhould think fit, there being always an equal Number of each Eſtate to be choſen for each Committee.

and judged Processes, which now they do not.

Privy Council.

6. The *Privy Council* is *constituted by a special Commission from the King, and regularly their Power extends to Matters of publick Government; in order to which, they punish all Riots*, for so we call *Breach of Peace. They sequestrate Pupils, give Aliments to them, and to Wives, who are severely used by their Husbands*, and many such Things, which require so *summar Procedure*, as cannot admit of the Delays necessary before other Courts. And yet, if any of these dip upon Matter of Law, (for they are only Judges in *Facto*) they remit the Cognition of it to the Session, and stop, till they hear their Report. The *Council also may delay Criminal Executions, and sometimes change one Punishment into another, but they cannot remit Capital Punishments. They may also adjourn the Session, or any other Court*; It has its own *President*, who presides in the Chancellor's Absence, and its own Signet and Seal: All who are cited to compear there, must be *personally* present; because, ordinarily the Pursuer concludes, that they ought to be *personally punished*. All *Diets are peremptor*, all Debate is in Writ, no Advocate being ordinarily allowed to plead before them, because, the Council only judges in Matters of Fact (*f*).

7. The

(*f*) Seeing we have no more a *Scotish* Parliament, nor Committees thereof, nor Conventions

Tit. 3. The *Lords* of Council and Session.

7. The Lords of *Council* and *Session* are Judges in all Matters of *Civil Rights*; of old, they were chosen by the Parliament, and were a Committee of Parliament *. But the present *Model* was fixed and established by *King* James *the Fifth*, after the Model of the Parliament of *Paris* †. (g)

* K. J. II. Act 61, 62, and 63.

† K. J. V. Act 36, 37, 38, 39, 40.

8. Of old, it consisted of seven *Ecclesiasticks*, and seven *Laicks*, and the *President* was a *Churchman*; but now all the Fifteen are *Laicks*. And there sits with them four Noblemen, who are called *Extraordinary Lords*, and were allowed to sit to learn, rather than decide; but now they vote as well as the *Ordinary Lords*. All the Lords are admitted by the King, and, by Statute, cannot be admitted, till they be Twenty five Years of Age, and except they have 1000 Merks, or 20 *Chalders* of *Victual* in yearly Rent. (h) Nine are a *Quorum*.

*K. J. VI. Par. 22. Act 132.

tions of the Estates, nor a Privy Council, which we had before the Year 1707. enough is said on these Sections.

——*Quis, talia fando,*
Temperet a Lachrymis.——

(g) See the present State of the College of Justice, prefix'd to *Spotiswood*'s Form of Process, last Edit. in 1725.

(h) The Lords of Session are nominated by the King, in a Letter addressed to the other Senators met in Court, who, upon Trial of Skill, finding the Person qualified, admit him: The Form of trying those presented to be Ordinary Lords of Session, is set down in an Act of *Sederunt*, *July* last 1674.

Besides,

Book I. Besides, a Knowledge of the Laws, and other Qualifications in the Notes on § 8, Tit. 2. foresaid; It is, by the 19th Article of the Union of the two Kingdoms of *Scotland* and *England*, ordered, That none shall be named by the Sovereign, to be ordinary Lords of Session, but such who have served in the College of Justice, as Advocates, or principal Clerks of Session, for the Space of five Years; or as Writers to the Signet, for the Space of Ten Years; with this Provision, That no Writer to the Signet be capable to be admitted a Lord of the Session, unless he undergo private and publick Trial on the Civil Law, before the Faculty of Advocates, and be found by them qualified for the said Office, two Years before he be named to be a Lord of the Session; yet, so as the Qualifications made, or to be made, for capacitating Persons to be named Ordinary Lords of Session, may be altered by the Parliament of *Great-Britain*.

Judging it improper to print the Mistakes of the Author's *Amanuensis*, or of his Printer, I have made the 2000 *lib.* in the former Editions 1000 Merks, conform to the Act cited. And, for further Illustration of this Matter, have given an Abbreviate of the Act, as follows. "In order to prevent the Corruption increasing in the "Session, His Majesty declares his Mind by Act "of Parliament, That he shall present to the va"cant Places in the Session; 1. A Man fearing "God. 2. Of good Literature. 3. Practick. 4. "Judgment. And, 5. Understanding of the Laws. "6. Of good Fame. 7. Having sufficient Living "of his own. And, 8. Who can make Dispatch "in the Affairs of the People. And, because there "was a Complaint for choosing young Men with"out Gravity, Knowledge and Experience, not "having sufficient Living of their own. There"fore declares, That none shall be received to "the Place of a Senator in the College of Justice, "except he be sufficiently tried and known by his "High-

9. CRIMES, of old, were judged by the *Justice-General*, *Justice-Clerk*, and *two Justice-Deputes*; but now *five Lords of Session* are joined to the Justice-General, and Justice-Clerk, and they are called the *Commissioners of Justiciary*, because they sit by a special Commission: Four of which Number make a *Quorum* in Time of Session, three in Time of Vacance, and two at Circuit Courts *. Tit. 3. Criminal Judges. *K. C. II. Par. 2. Sess. 3. Act 18.

10. THE *Exchequer*, is the King's Chamberlain-Court †, wherein he judges what concerns his own Revenues; it consists of the *Thesaurer*; (in whose Place are sometimes named *Commissioners of the Thesaury*) the *Thesaurer Depute*, and as many of the Lords of Exchequer, as His *Majesty* pleases. Exchequer. † K. C. I. Par. 1. Act 18.

11. THE *High Admiral* has a Commission from the *King*, to judge in all Ma- High Admiral.

"Highness, and whole Lords of Session: That he "have in yearly Rent, properly pertaining to "himself, 1000 Merks, or 20 Chalders of Victual; And that his Experience, Quality and Conversation may be better tried; That he be of "the Age of 25 Years complete, annulling all "Presentations granted otherwise". This is almost a Copy of Act 93. Parl. 1579. Our Author, in his Observations on the above Act 132, says, That Part of it relating to the yearly Rent, was not in his Time keept strictly, tho' made of Design, not only to prevent Bribing; but also, that Parties injured by the Lords may have a Fund, out of which Reparation shall be got, *Si judex litem suam fecerit.*

Book I. Maritime Affairs, not only in Civil, but also in Criminal Cases, where the Crime is committed at Sea, or within the Flood-mark; nor can the Lords of Session advocate Causes from him *, though they can suspend and reduce his Decreets, as he does the Decreets of all inferior Admirals, or Admiral Deputes.

*K. C. II. Par. 3 Act 16.

For farther Knowledge of these Courts treated of in the preceeding Sections, see our Author's Treatise, entituled, *The Laws and Customs of Scotland in Matters Criminal.* Part II. Tit. 3, § 6, 7, 8, 9.

TIT. IV.

Of Inferior Jurisdictions and Courts.

NO Judicature whatsoever can sit in Time of Paliament, without a Dispensation from the Parliament (*a*); and no inferior Court can sit in Time of Vacance, without a Dispensation from the Lords of Session: But, after *Michaelmas* Head Court, the Restriction ends, and they may at any Time proceed to *cognosce Crimes*, without Dispensation: For, *Interest Reipublicæ*, that *Crimes be punished without Delay.*

THE

(*a*) This Practice, it seems, is changed, and the Position in the § is reversed; for the Session, and all inferior Courts sit now in Time of Parliament, and have done so ever since the Revolution, unless they be adjourn'd; as may be seen in the several

2. The *Sheriff* is the *King's chief* and *ancient Officer*, for preſerving the *Peace*, and puting the Laws in Execution *; he has both a Civil and *Criminal Juriſdiction*, and his Commiſſion is under the *Great Seal*; he is obliged to raiſe the *Huy* and *Cry* after all *Rebels*, and to apprehend them, when required; to aſſiſt ſuch as are *violently diſpoſſeſt*; to apprehend ſuch as *ſay Maſs*, or *trouble the Peace*, and take Caution for their Appearance †: He is *Judge* in all Crimes, except Treaſon, and the *four Pleas* of the *Crown*, to wit, *Murder*, *Fire-raiſing*, *Robbery*, and *Raviſhing* of *Women**; but Murder he can judge, if the Murderer was taken with *red Hand*, that is to ſay, *immediately committing the Murder*; in which Caſe, he muſt proceed againſt him *within*

Tit. 4.
Sheriff.
* K. J. VI. Par. 12. Act 24.
† K. C. II. Par. 1. Seſſ. 3. Act 15.
* Leg. Mal. 2. Act 11. Quoniam Attach. cap. 79.

ſeveral Acts made for Adjournment of the Seſſion, by which the Parliament diſpenſes with the ſitting of inferior Courts, in the mean Time, as if the Seſſion had not been adjourned.

By Act of *Sederunt*, *July* 21, 1696. the Lords having diſcharged the Clerks to the Bills, to write on Bills for granting Diſpenſations to inferior Courts, beyond the 20th Day of *Auguſt*, for the Harveſt Vacance; and beyond the 20th Day of *March*, for the Spring Vacance; and this is declared to be the Rule in all Time coming.

The Commiſſary-Courts cognoſce, without Diſpenſation, at all Times, Matters conſiſtorial; ſuch as Confirmation of Teſtaments, Divorces, Scandals, and other Cauſes, over which they have a Privative Juriſdiction in the firſt Inſtance. See Book 1. Tit. 2. § 10. and Tit. 5. § 19. Tit. 6. § 16.

Book I. *within three Suns*; and in *Theft* he may *judge*, if the *Thief* was taken with the *Fang* (*b*).

3. The *Sheriff is also Judge competent*, to punish *Bloodwits*, for which he may fine in 50 *Pounds Scots*, but no higher *regularly*; except the *Riot* be *attrocious*, or *aggravated* by the Circumstances of *the Time and Place*, when and where it was committed, or of the Persons upon whom it was committed.

(*b*) In *Reg. Maj. lib.* 1. *cap.* 1. *ver.* 5, 6. There's a Recital of Crimes which belong to the Crown, and to the Justiciary; after which, in *ver.* 7. *Excipitur Crimen Furti, & Homicidii, quæ ad Vicecomitem pertinent, ubi certus accusator apparet.* And in *ver.* 8. *Sed Furtum & Homicidium, per indictamentum promulgatum, pertinent & debent coram Justiciario per Assisam de vicineto terminari.* But, since the writing that old Book, our Laws and Practick are alter'd. For, at this Time, Sheriffs, Baillies of Royalty and Regality, cognosce and judge in Theft, by Way of Action; especially, if it be in petty Matters, and, if it be under the Degree of that Kind of it, which is punishable capitally. This, our Author in his *Treatise of Criminals*, (which was published in the Year 1678, six Years before the first Edit. of his *Institut.*) Tit. XIX. § 7. in the End, calls an Error, for, says he, all Process upon Citation against a Thief, should belong to the Justices; Albeit, in § last of this Tit. towards the End, he says, a Sheriff can judge Theft upon Citation. It is by *Act* 4. *Parl.* 1695, anent the Justice Court ordained, "That in all "Capital Crimes, wherein inferior criminal "Courts were hitherto limited, to try and exe-"cute within *Three Suns*; this Time shall be "restricted only to the Trial and Sentence, but "not to the Time of Execution, which is (by "that

mitted. He may likewise for *Contumacy* fine in 10 Pound *Scots* (*c*). Tit. 4.

4. Royal *Burghs* are not *Sheriffs* within themselves, except the *King* grant them the *Privilege* by a special *Concession*; and even when they are erected *Sheriffs* within themselves, they are not exeem'd from the *Sheriff*'s *Jurisdiction*, within whose Bounds the *Burgh* doth ly, but they have only a *Cumulative* Power with them; so that there is *Locus Præventioni*, and the first Attacher will be prefer'd: But, if their Erection contain a Power of Repledging from the *Sheriff*, then they have the same Power that is *competent* to a Lord of *Regality* (*d*).

5. *A Lord of Regality is he, who has the Land whereof he is Proprietor or Superior, erected with a Jurisdiction equal to the Justices in Criminal Causes; and to the Sheriff in Civil Causes; he has also Right to all the Moveables of Delinquents and Rebels, who dwell within his own Jurisdiction*, whether these *Moveables* be within the Regality, or with- Lords of Regality.

" that Act) left to the Discretion of the Judge, " not exceeding nine Days after Sentence.

(*c*) The Fines imposed for *Bloodwits*, and atrocious Riots, are become scandalously arbitrary, and want to be regulated.

I have altered 50 *lib.* in the former Editions, to 10 *lib.* the usual Fine for Contumacy.

(*d*) There's no Place for Prevention out of Actions for Delicts, wherein several inferior Judges and their Officers may happen to compete, more for the Benefit of a Fine than for Honour of doing Justice.

without the same: And because he has so great Power, therefore no *Regality* can *legally be granted, except in Parliament**.

† K. J. II Act 43. Repledgiation.

6. THE *Lord of Regality*, has also by his Erection *Power to repledge from the Sheriff*, and even from the *Justices* in † all Cases except *Treason*, and the *Pleas* of the *Crown*; *that is to say, to appear, and crave that any dwelling within his Jurisdiction, may be sent back to be judged by him*; and he is obliged to find Caution, that he shall do Justice upon the *Malefactor*, whom he *repledges* within Year and Day, and the *Caution* is called *Culreach**. (*e*)

† K. J. VI. Par. 11. Act 29.

* Quoniam Attach. c. 89.

Stewart.

7. THE *Stewart* is the *King's Sheriff* within the *King*'s own proper Lands, having as much Power and Privilege as a *Regality*; and these were erected, where the Lands, having been erected before in *Earldoms* or *Lordships*, fell in the *King*'s Hand by Forefaulture, or otherwise. For else, the King appointed only a *Baillie* in them, and these *Jurisdictions* are called *Baillieries*, the *Baillies* of the King's proper Lands, having the same Power with the *Sheriff*. And all these, *viz.* the *Sheriff*, the *Stewart*, and the *Lord of Regality*, proceed

Baillie.

(*e*) In this Matter of Repledging, there's a remarkable Variety, arising from the several Kinds of Regalities, which are either Laick or Ecclesiastick; for Knowledge whereof, and of the manner of Repledging, see our Author's *Treatise of Criminals, Part* II. *Tit.* 11. § 6, and 7.

ceed in their *Courts* after the ſame Way, Tit. 4. and each of them has a *Head Burgh*, where they hold their *Courts*, and where all Letters muſt be executed and regiſtrated.

8. THE *Prince of Scotland* has alſo an *Appanage* or *Patrimony*, which is erected in a *Juriſdiction*, called the *Principality*. The Revenues come into the *Exchequer*, when there is no *Prince*; but, when there is one, he has his own *Chamberlain*. Prince of *Scotland*.

9. JUSTICES of *Peace* are theſe, who *are appointed by the King, or Privy Council*, to *advert to the keeping of the Peace*; and they are Judges to *petty Riots, Servants Fees*, and many ſuch like, relating to good Neighbourhood, expreſt in the Inſtructions given them by the Parliament*, and are named by the Council; albeit, by the foreſaid *Statute*, the *Nomination* is to be by His *Majeſty*, and His *Royal Succeſſors*, which the King has now remitted to the Privy Council. (f) Juſtices of Peace. * K. C. II. Par. 1. Act 38.

10. THE *Juſtices of Peace* do name *Conſtables*, within their own Bounds, from ſix Months to ſix Months; Their *Office is*, to Conſtables.

wait

(f) For many Years, both before the writing theſe Inſtitutions, and ſince, till the Union of the two Kingdoms in 1707, the Juriſdiction of the Juſtices of Peace was very much decay'd; but, at this Time, is reviv'd and exerc'd with great Vigour, in Virtue of the Powers given to them, by ſeveral Acts of the *Britiſh* Parliament, touching the King's Revenue, &c. The Juſtices are, from Time to Time, nominated by the Sovereign.

wait upon the Justices, and receive Injunctions from them, delate such Riots and *Crimes* to the *Justices*, as *fall under their Cognizance*; *apprehend all suspect Persons, Vagabonds* and *Night-walkers*, as is at length contained in their Injunctions, given them by the foresaid *Act*.

Baron Courts.

II. EVERY *Heritor* may hold *Courts* for causing his Tenants pay his Rent: And, if he be infeft *cum Curiis*, (g) he may decide betwixt Tenant and Tenant in small Debts, and may judge such as *commit Blood on his own Ground*, though his Land be not erected in a *Barony*; but, if his Land be erected in a Barony, (which the King can only do) he may (like the *Sheriff*) *unlaw* for *Bloodwits*, in 50 *lib.* and for Absence in 10. And, if he *have Power of Pit* and *Gallows*, he has as ample a *Criminal Jurisdiction*, as the *Sheriff*, though, with this Difference, that the *Sheriff* can judge a *Thief upon Citation*, whereas the Baron can only judge him, if he apprehend him within the Barony: And, if the *Sheriff* have first *cited* or *attached* the *Malefactor*, he excludes the Baron's *Jurisdiction* by that Prevention.

TIT.

(g) One infeft *cum Curiis*, (and no more) cannot judge Riots; but, if the Charter express, *cum Curiis & Bloodwitis*, he can cognosce in these, and *Bloodwits* also. See *Craig de Feud. Lib.* 1. *Dieg* 8. § *de Curiis*, &c. & § *de Bloodwitis*, *Page* 192.

TIT. V.

Of Eccleſiaſtick Perſons.

SINCE the *Reformation*, the *King* is *come, by our Law, in place of the Pope**, and all Rights to *Kirk-lands*, muſt be confirmed by him, elſe they are null†. His *Majeſty* only can call *Convocations* of the *Clergy*, (for ſo we call our *National Aſſemblies**) and his *Commiſſioner* ſits in them, and has a Negative *(a)*.

*K. J. VI. Par. 1. Act. 2.

†K. J. VI. Par. 9. Act 7. Convocation of the Clergy.

*K. J. VI. Par. 8. Act 131. K. C. II. Par. 1. Seſſ. 1. Act. 4. Seſſ. 3. Act 5.

(a) That the Expreſſion, The King is come in Place of the Pope, may be rightly underſtood, it is fit to know, that, as from the Beginning, ſo alſo, ſince the Diſtinction of Perſons into Clergy and Laity, the Sovereign was ſupreme Ruler over all Perſons living within his Kingdom, and had a *dominium Eminens* or *proprium*, in all Things lying within his Territory, from whoſe lawful Power and Juriſdiction, none, either for his Perſon, or for his Eſtate, could plead Exemption or Immunity: But *Moſes* and our bleſſed Saviour having, for the Service of the great God, ſettled certain Offices (which from their Deſign were called *Divine*) to be conferred on Perſons fit for them, who were inſtal'd in a Form appointed by theſe great Lawgivers; and as the Form and Figure of theſe ſacred Functions proceeded from God, ſo does the Power to exerce them, in ſo far as, that no Mortal can either confer them to the Perſons, or when confer'd, deprive them from their Offices, except God himſelf, and thoſe to whom he hath given Power and Authority ſo to do. Hence it follows, that the King, who himſelf is but a Servant in chief appointed of God for the Welfare of the Subjects, has no Au-

thority

Book I.

Archbishops and Bishops.

We have *two Archbishops*, and *twelve Bishops*, and they are thus *elected*; the *King* sends to the *Chapter* a *Conge de Eslire*, (which is a *French* Word, signifying a *Power to Elect*) and with it a Letter recommending a Person therein named, and the *Chapter* returns their Election: Whereupon the *King* grants a *Patent* to the Elected, giving

thority in these Religious Ministrations, nor no Power to alter or innovate the Fundamentals of them; tho' it cannot be denied, in accidental Occurrences, and in certain Circumstances, which respect the external Form of exercing these Holy Offices, such as respect Times and Places, and the like, the Sovereign with Consent of the Clergy, may have Power to direct. This Establishment of a spiritual Faculty to Churchmen, distinct from, and independent upon the Civil Power, can never occasion Disorder in the State, because these two have different Objects, and still the Persons of these holy Ministers and their Effects, are not withdrawn from the Jurisdiction of their Prince, who can never fear any Encroachment from Christians or Clergy, who know their Duty, and live according to it. But, in ancient Times, the Pope and the *Romish* Clergy, having usurped upon the Rights of the Sovereign and Civil Magistrate, and having established a *Dominium in Dominio*, by withdrawing from him to themselves the Persons and the Estates of the Churchmen, and by conferring Ecclesiastick Offices, not only without Consent, but even against the Order of the Prince, as is instanc'd in our History, the Parliament at the Reformation, resumes from the Pope, and restores to the King these Rights and Privileges, which, for several Ages before, the *Romish* Clergy had till then possest.

giving a Right to the Revenue, during Life, and a *Mandate* to the *Archbiſhop* or *Biſhops* to conſecrate him: Both which paſs the *Great Seal**(*b*). Tit. 5. *K. J. VI. Par. 22. Act 1.

3. THE *Archbiſhops* and *Biſhops have the ſole Power of calling Synods*, which is a *Provincial Aſſembly of all the Clergy within one Diocie* †; and, in theſe, they name the *Bretbren* of the Conference: Who are like the *Lords of Articles* in the *Parliament*; and by their Advice the *Biſhops* depoſe, ſuſpend, and manage. Synods. † K. J. VI. Par. 21. Act 1.

4. BISHOPS have their *Chapters*, without whoſe Conſent, or the *major Part*, the *Biſhop* cannot alienate nor dilapidate any Part of their Patrimony †; which *major Part* muſt ſign the Deeds done by the Chapters. † K. J. VI. Par. 18. Act 3.

(*b*) By Act 3. Parliament *July* 1689. Epiſcopacy, and all Superiority of any Office in the Church above Presbyters, is aboliſhed, and all Acts, which did eſtabliſh Prelacy, are reſcinded, which are more ſpecially ſet down in the following Act ſettling Presbyterian Church Government, there being no Government in the Church by Law eſtabliſhed, for the Space of eleven Months. The Eſtates, by their Act 3. Parliament *June* 1690. did ratify and confirm the Presbyterian Church Government and Diſcipline, that is to ſay, The Government of the Church by Kirk-Seſſions, Presbyteries, provincial Synods, and General Aſſemblies, eſtabliſhed by Act 114. Parl. 1592, reviving that Act in the whole Heads thereof, except that Part of it, which relates to Patronages. By the ſame Act the *Weſtminſter* Confeſſion of Faith is approven as the publick and avowed Confeſſion of this Church.

Book I. *Biſhops*: And it is ſufficient if thoſe of the *Chapter* ſign at any Time, even after the *Biſhop*, but it muſt be in his Lifetime: Nor are *Minors*, or *Abſents* counted; and one having two *Benefices*, has two Votes; but the Appending of the *Seal* is by ſpecial *Statute* declared to be ſufficient in Deeds done by the *Archbiſhop* of St. *Andrews*, without the *Subſcriptions* of the *Chapter**.

* K. J. VI. Par. 19. Act 8.

5. A *Parſon* or *Rector Eccleſiæ*, is he, *who is preſented to the Tithes, jure proprio*; but becauſe, of *old, Parſonages* were beſtowed on *Monaſteries*, therefore they ſent *Vicars*, ſo called, becauſe they ſerved the *Cure for them*, and who got a Share of the Stipend for their Pains, either *ad placitum*; and they were called *ſimple Vicars*; or for *Life*, and they were called *perpetual Vicars*: And after the Reformation, the Churches which ſo belonged to them, continued *Vicarages* ſtill; The *Titular*, who came in the Place of the *Convent*, retaining the Right to the *Parſonage duties*.

Vicars.

6. THERE were, in the Times of Popery, *Collegiate Kirks* built, and *doted by Kings, and great Men*, for *ſinging of Maſs*, which were governed by a *Provoſt*; and ſome for *ſinging*, who were called *Prebends*: And, becauſe ſome *Pariſhes* were wide, ſome were allowed to build a *Chapel* for their *private Devotion*: And ſince the *Reformation*, theſe *Chaplanaries* and *Prebendaries*

Collegiate Kirks.

Chaplanaries.

daries are allowed to be beſtowed by the *Patrons*, upon *Burſars* in *Colleges*, notwithſtanding of the *Foundations* †. Tit. 5. † K. J.VI. Par. 1. Act 12.

7. For underſtanding all theſe, it is fit to know, that the *Primitive Church*, either to invite Men to *Build* or *Dote*, or to reward ſuch as had, did allow ſuch as either had built, or had beſtowed the Ground whereon to build, or had *doted a Church* already built, to *preſent alone*, if they were the only *Benefactors*, or *by Turns*, if they were moe; and they were called Patrons (*c*), or *Advocati Eccleſiarum*, according to that,

Patronum faciunt, Dos, Ædificatio, Fundus.

8. When a *Church* vaiks, the *Patron* muſt preſent, within ſix Months, a fit Perſon to the *Biſhop*; elſe the Right of *Preſentation* falls to the *Biſhop*, *jure devoluto* (*d*)*: But if the *Biſhop* refuſe to admit and collate the Perſon preſented, the Patron. *K. J.VI. Par. 2. Act 1.

(*c*) By Act 23. Parl. *July* 1690, Patronages and Preſentations are made void, and in place thereof, a Calling of a Miniſter by the Heritors and Elders of the vacant Church, is ſettled; but by Stat. 10. *Annæ* Cap. 12. Patronages, as formerly, are reſtored, and ſtill continue.

(*d*) The Acts of Parliament, which treat of the Power and Authority of Biſhops in Spirituals, or in the Government of the Church, are now ſo intererpreted, that, in place of Biſhops, we read Presbyteries, wherethrough *Jus devolutum*, &c. which belonged to Biſhops, falls in the Hands of Presbyteries, and if they fail to accept of, and admit a Perſon preſented, the Pa-

Patron muſt complain to the *Archbiſhop*; and if he alſo refuſe or delay, the *Privy Council* will grant Letters of Horning againſt the *Biſhop*, to receive the *Perſon* preſented †, and, during the *Vacancy* upon that Refuſal, the *Patron* may retain the *vacant Stipends* (*e*).

† As before ſaid.

9. UPON this *Preſentation* the *Biſhop* cauſes ſerve an *Edict* on nine Days, wherein all Perſons are, after *Divine Service*, advertiſed to object why ſuch a Man ſhould not be admitted to the *Benefice*: And if none *object*, the *Biſhop* confers the Church and Benefice upon the *Perſon* preſented; and this is called a *Collation*: After which, the *Biſhop* cauſes enter him, who is ſo *collated*, by cauſing give him the *Bible* and the *Keys* of the *Church*; and this is called *Inſtitution*: *Preſentation* gives only *jus ad rem*, and *Inſtitution*, *jus in re*, and is as a *Saſine* *.

Collation and Inſtitutions.

10 If

Patron enters an Appeal to the Synod; and if the Synod do not anſwer his Expectation, there's a ſecond Appeal to the General Aſſembly, which never fails to give final Deciſion: Tho' of late, a Patron diſpleaſed with the Determination, appealed to the Lords Spiritutual and Temporal in Parliament aſſembled, and got the Sentence of our ſeveral Judicatories reverſed.

(*e*) By Act 23. Parl. 1690.

* By Act 23. Parl. July 1690, "concerning Patronages, it is declared", That Patrons have Right to employ the vacant Stipends on pious Uſes, within the reſpective Pariſhes, except

10. If the *Biſhop* be *Patron* himſelf, he confers *pleno jure*; and the *Preſentation* and *Collation* are the ſame; *Biſhops* alſo have *Menſal Churches*, ſo called, becauſe they are *de menſa Epiſcopi*, being a part of his *Patrimony*, in which he ſerves by his *Vicars*, and *plants* as *Dioceſian Biſhop*; and if a *Town* or *Pariſh* reſolve to make a *ſecond Miniſter*, when they are not *Patrons*, he is called a *Stipendiary Miniſter*; (as are all Miniſters who are preſented to *modified Stipends*) and he is *collated* and *inſtituted* alſo, but the *Patron*'s Preſentation is ſufficient in *Prebendaries* and other *Benefices*, which has not *curam Animarum*; and that without the neceſſity of *Collation*, or *Inſtitution*; the *Biſhop* having no other Intereſt in the *Benefices*, but in ſo far as they concern the *Cure of Souls*. Tit. 5.

Menſal Churches

Stipendiary Miniſter.

ceept where the Patron is Popiſh; in which Caſes, he is to employ the ſame on pious uſes, by the Advice and Appointment of the Presbytery. And in Caſe the Patron ſhall fail in thus applying, that he ſhall loſe his Right of Adminiſtration of the vacant Stipend, for that and the next Vacancy; and the ſame ſhall be diſpoſed on by the Presbytery, to the uſes foreſaid, excepting the vacant Stipends within the Bounds of the Synod of *Argyle*, (which by the Act 24th following, are to be applied for training up of Youth at Schools and Colleges, *&c.* See that Act.) By the ſaid Act 23. there's a new Right of the Tithes of the Pariſh given to Patrons, which is mentioned in the Note ſubjoined to § 11. Tit. 10. Book 11.

Book I. 11. By Act of Parliament, all *Miniſters* must have a competent Stipend, not below *eight Chalder of Victual*, or 800 *Merks*, or above a 1000 *Merks*, or 16 *Chalder of Victual*, (except there be juſt Reaſon to give leſs) † together with *a Manſe* and *Glebe*. But the *Commiſſioners for Plantation of* Kirks, are not now preciſely tied to theſe Proportions, but may modify either more or leſs, according as they ſee Cauſe.

Miniſter's Stipend.

†K. J. VI. Par. 22. Act 3.

Manſe. 12. The *Manſe*, *a manendo*, is the Place where the *Miniſter* is to dwell; the *Glebe*, from *Gleba terræ*, is *a Piece of Land for Corn and Fodder to his Beaſts*: If there was a *Manſe* of old belonging to the *Parſon* or *Vicar*, the *Miniſter* has Right to it; if there was none, the *Pariſhioners* muſt build one, not *exceeding* 1000 *lib.* and not *beneath* 500 *Merks* *, at the ſight of the *Biſhop* of the *Diocie*, or ſuch *Miniſters* as he ſhall appoint, with *two or three* of the moſt diſcreet Men in the *Pariſh*: As alſo, the *Heritors* are liable to repair the *Manſe*; but the preſent *Incumbent* is obliged to leave it in as good *Condition* as they gave it to him †.

*K. J. VI. Par. 13. Act. 161.

†K. J. VI. Par. 21. Act 8.

13. The *Miniſters Glebe* is to comprehend *four Acres of arable Land*, or *ſixteen Soums graſs*, where there is no *arable Land*, which is to be deſigned out of the Lands which belonged of old to *Abbots*, *Priors*, *Biſhops*,

Biſhops, Friars, or any other *Kirk-lands* within the *Pariſh* *; with freedom of *Foggage, Paſturage* for a *Horſe* and two *Cows*, *Feuel, Feal* and *Divot*; which *Glebes* are to be deſigned by *Miniſters* named by the *Biſhop*, with the Advice of two *of the moſt honeſt and godly of the Pariſhoners*, and the Deſignation is to be ſigned by the Deſigners *.

Tit. 5.

* K. J. VI. Par. 3. Act 48.

* K. J. VI. Par. 11. Act 116.

14. If a *Biſhop* or *Miniſter* be *conſecrated, tranſlated*, or *entered* to his Benefice before *Whitſunday*, he has Right to the whole Years Fruits, becauſe *they are then preſumed to be fully ſown*; and if he be depoſed or *tranſported* before *Whitſunday*, for that ſame Reaſon he hath no Part of that Year: But if he ſerve the *Cure* after *Whitſunday*, and be *tranſported* or *depoſed* before *Michaelmas*, he hath the half of that Year's Stipend; and if he ſerve till after *Michaelmas*, he hath the whole. So that *the legal Terms of Benefices are* Whitſunday, *at which Time the Sowing is ended*; and *Michaelmas*, at which Time the Fruits are reaped (*e*).

15. The *Relicts, Bairns, or neareſt of Kin*, have likewiſe Right to the *Annat* after

(*e*) Stipends, as other conſtant annual Duties, are payable Termly; and being Alimentary, are to be paid by Anticipation; ſo that *Whitſunday's* Portion ſatisfies the Miniſter for his Service, from that Term to *Michaelmas*, and the *Michaelmas Portion* pays from that Term to *Whitſunday*.

Book I. after their Death, which was introduced by the *Canon Law*, and by a ſpecial *Statute* with us, is declared to be *half a Year's Rent of the Benefice or Stipend, over and above what is due to the Defunct, for his Incumbency* *: So that if he ſurvive *Whitſunday*, they have the half of that Year for his *Incumbency*, and the other half as *Annat*, and if he ſurvive *Michaelmas*, they have the half of the next Year for his *Annat*.

*K. Ch. II. Par. 2. Seſſ. 3. Act. 13.

16. The *Annat* is equally divided betwixt the Relict and the Children; and if the *Defunct* have neither, it belongs to the neareſt of *Kin*; it needs no Confirmation, for it never belonged to the *Defunct*, being a mere Gratuity beſtowed by the *Law* for entertaining theſe, becauſe, it is preſumed, *Miniſters* have not much to leave them: And, for the ſame Reaſon, it is not effectable by the *Defunct's Creditors*, nor can it be diſpoſed upon by himſelf to Strangers, either in his Teſtament or by Aſſignation (*f*).

High Commiſſion.

17. There is a *Committee of Parliament* always ſitting, called, *The Commiſſion for Plantation of Kirks*, or *Valuation of Teinds*,

(*f*) The Annat is divided among the ſurviving Wife and Children of the Defunct, extant at the Time of his Deceaſe *ſecundum capita*, and if the Relict die before Payment, her Share goes to to her Children, and failing ſuch, to her other neareſt in Kin; but the Wife and her Executers have no Intereſt in this Annat, except ſhe ſurvive her Husband, tho' it were but one Day or one Hour.

Teinds, (conſiſting of a *Select* Number of ſo many of every *Eſtate of Parliament*;) who have Power to *modify* and *augment Miniſters Stipends*, and to *unite* and *disjoin Churches*, &c. whoſe Decreets, becauſe they are a *Committee of Parliament*, cannot be reduced by the *Seſſion*, or any other *inferior Judicature* (g). Tit. 5. Committee of Parliament.

18. The *Primitive Chriſtians* remitted the Cognition of all Caſes that related to Religion, as the Matters of *Divorce*, *Baſtardy*, *the Protection of dying Mens Eſtates*, *to their Biſhops*, or ſuch as they imployed under them, who were called *Officials*, and with us are called *Commiſſars*; their Office gives them likewiſe the Name of *Judices Chriſtianitatis*, and they are therefore the only Judges in *Divorce*, becauſe it is the breach of a *Vow*: And to *Scandal*; becauſe it is an Offence againſt *Chriſtianity*: And of all Matters referred to *Oath*, (if the ſame exceed not 40 *lib. Scots*) becauſe that Commiſſars.

(g) In the Place of this Commiſſion, the Lords of Council and Seſſion are, by 1. Q. *A. Act* 9. *Par. An.* 1707, authoriſed to cognoſce and judge in all Cauſes pertaining to the Juriſdiction of the ſaid Commiſſion, conform to the Rules laid down in the ſeveral Acts of Parliament not repealed at the Time. Provided the tranſporting Kirks, diſjoining too large Pariſhes, or erecting and building new Kirks, be done with Conſent of the Heritors of three Parts of four, at leaſt, of the Valuation of the Pariſh, whereof the Kirk is craved to be tranſported, &c.

Book I. that Power is contained in their Inſtructions, and that an *Oath* is a *Religious Tie.*

19. EVERY *Biſhop* has his *Commiſſar*, who has his Commiſſion from the *Biſhop* only; and this extends no further than the *Conſtituent's Diocie.* But the *Archbiſhop* of St. *Andrews* has Power to name four *Commiſſars*, who are called the *Commiſſars of Edinburgh*, becauſe they ſit there, and they only are *Judges to Divorce upon Adultery*, and can only declare *Marriage null for Impotency*; and to *Baſtardy*, when it has any *Connexion* with *Adultery* or *Marriage*: And they only *may reduce the Sentences of all inferior Commiſſars* *, though the *Lords of Seſſion* may reduce even their *Decreets and Sentences.* They have *Inſtructions from the King*, which are their *Rule.* And theſe are likewiſe recorded in the Books of *Sederunt of Seſſion* (g).

Commiſſars of *Edinburgh.*

*K. J. VI. Par. 26. Act 6.

TIT

(g) The Four Commiſſars of *Edinburgh*, to whom the ſupreme Conſiſtorial Juriſdiction is committed, were, in Time of Epiſcopacy, nominated by the two Primates, thus, The Archbiſhop of St. *Andrews*, who is *Primas Totius Scotiæ*, nominated Two; and the Archbiſhop of *Glaſgow*, ſtyled *Primas Scotiæ* (leaving out *Totius*) named other Two; but ſince the aboliſhing of Epiſcopacy, the Sovereign names all the Commiſſaries in *Scotland.*

Theſe Inſtructions are recorded by Virtue of an Act of Sederunt, *Feb.* 20. 1666, and printed with other Acts prefixed to my Lord *Stairs's* firſt Volume of Deciſions, which ſee.

TIT. VI.

Of MARRIAGE.

Having ſpoken fully of Perſons, as they are conſidered in a legal Senſe; we ſhall now treat of Marriage, which is the chief Thing that concerns Perſons, and their State in Law.

MARRIAGE is defined to be the *Conjunction of Man and Wife, vowing to live inſeparably together till Death.* Marriage

2. By *Conjunction*, here, *Conſent* is underſtood; *nam conſenſus, non coitus, facit Matrimonium.*

3. Consent is either, *de futuro*, or *de præſenti*. Conſent *de futuro* is, a Promiſe to *ſolemnize the Marriage*, which in *Law* is called *Sponſalia*; and this is not *Marriage*, for either Party may reſile, *rebus integris*, notwithſtanding of the *interveening Promiſe*, or *Eſpouſals*. Conſent *de præſenti* is that, in which *Marriage* does conſiſt; and therefore it neceſſarily follows, that none can *marry*, except theſe who are capable to Conſent, and ſo *Idiots, and furious Perſons, durante furore*, cannot *marry*; nor *Infants*, who have not attained the uſe of *Reaſon*: That is, when they are within the *Years of Pupillarity*, which is Sponſalia

do-

is defined in *Law* to be 14 Years in *Males*, and 12 in *Females*, *Nisi malitia suppleat ætatem* (*a*).

4. The *Law*, in *Decency*, requires the Consent of *Parents*, though a *Marriage* with-

(*a*) The Humaniſts make the Word *Malitia*, by a tranſlative Interpretation, to ſignify Sagacity, Wit, and Underſtanding to do ill; and in the *Roman* Law *Malitioſus* and *Doloſus* are Synonomous (See R. *Stephani Theſaurus Linguæ Latinæ*, *Stephen*'s Latin Lexicon.) Now, the having a Faculty to hurt by Forethought, imports a Stability and Firmneſs of the Organ on which the Mind operates, from which Sufficiency in the Body, the *Canoniſts* preſume an Aptitude and Capacity to beget Children. Beſides, this Word *Malitia* in *C.* 9. *De Deſponſatione impuberum*, and in *C. ult. Ejuſd.* is called *Prudentia*; and it is there ſaid, *Niſi prudentia ſupplet ætatem.* In this Point the *Civilians* form upon a certain Number of Years, when the Body is thought to acquire Stability, a Rule concerning the Judgment, and a Capacity to Conſent, one of the Requiſites to Marriage; whereas the *Canoniſts*, in a retrograde Way, judge of the Firmneſs of the Body in young People, and of their Capacity to procreate, by the Cunning and Wit of their Mind. This Cuſtom is obſerved in all the *Popiſh* Countries, and among ſome of the Foreign Proteſtants, who think it ſafer to commit to the Magiſtrate to judge of the Perſons, and of the Age fit for contracting Marriage: And in this Trial, they uſe the indecent Obſervation and immodeſt Sighting of the Bodies of the Male and Female, expreſly prohibited by *Juſtinian*, *L.* 3. *Cod. quando Tut: vel Curat. eſſe de ſin.* In this Article we follow the *Roman* Law, and reject the *Canons*.

without it is valid, if the Persons *married* be capable of consenting. Tit. 6.

5. By our *Law*, none can marry who are nearer related than *Cousin-germans*, which is suitable to the *Judicial Law* of *Moses**, and the same Degrees prohibited in *Consanguinity*, are also forbidden in *Affinity*.

*Levit. chap. 18.

6. Marriage, is either *Regular* and *Solemn*, or *Clandestine*; the regular Way of *Marrying* is, by having their Names proclaim'd in the Church, three several times, which we call *Proclamation of Banns*, without which, or a Dispensation from the *Bishop*, the *Marriage* is called *a clandestine Marriage*; and the *Parties* are liveable for it, and both lose their † *Jus Mariti*, and *Jus Relicti*, but the *Marriage* is still valid *; *Cohabitation* also, or dwelling together, is presum'd to be *Marriage* †, if the *Parties* were repute *Man and Wife, during their Lifetime*, and so the Children are not *Bastards*; though they cannot prove that their Parents were married, unless it be clearly prov'd that they *were not married* (*b*).

K. Ja. VI. Parl. 1. Act 1.

Division of Marriage.

†K. C. II. Par. 2. Sess. 3. Act 9.

*K. C. II. Par. 1. Sess. 1. Act 34.

†K. J. IV. Act 77. K. C. II. Par. 2. Act 9. Sess. 3.

From

(*b*) Presbyteries are, in some necessary exigents, allowed to dispense with Proclamation of Banns, Act 21. of Assembly, in *Anno* 1638.

By Act 5. Ass. 1690, The Name and Designation of the Persons to be married, must be given up to the Minister, and when proclaimed, the same must be audibly exprest.

Communion of Goods.

7. From the *conjugal Society* ariſes the Communion of *moveable Goods* betwixt *Man* and *Wife*; but the Adminiſtration thereof, during the *Marriage*, is ſolely in the Husband; which reaches even to Alienation, and diſpoſing upon the Moveables at his Pleaſure, though they be not diſpon'd to him by her, (Marriage being a legal *Aſſignation* as to this Effect) but he has no further Right to her Heritage, ſave that he has Right to the Rents of it, and to adminiſtrate and manage it, during the *Marriage*, and this is called *Jus Mariti*, and is ſo inſeparable from the Quality of a *Husband*, that he cannot, by our *Law*, renounce his *Power* of *Adminiſtration*; ſo that they are both *Domini* by this *Communion*; but the Husband has during

Jus Mariti.

The Miniſter and Kirk-Seſſion, upon grave and weighty Conſiderations, are in uſe to diſpenſe with part of the Law, by proclaiming the Parties twice in one Day, and ſometimes thrice: They muſt be called by their Name and Sirname.

The Act 34. Parl. 1661, is renewed by Act 12. Parl. 1695, which diſcharges outed Miniſters to Marry or Baptiſe, and the Execution of both is given to any Procurator-Fiſcal, but now, by Act 10. *Anna*, the Epiſcopal Clergy may Marry and Baptiſe.

Further, By Act 6. Parl. 1698, the Perſons irregularly married are obliged, under certain Penalties therein expreſt, to declare, when required, the Name of the Celebrator, and of the Witneſſes, that the firſt may be ſeized and puniſhed, and the others fined in 100 Lib. for pious Uſes;

during the Marriage the Adminiſtration Tit. 6.
and Diſpoſal of the Goods in the Communion: But a Stranger may effectually convey an Eſtate to a Wife, ſo as that it will never be ſubject to the Husband's Adminiſtration (*c*).

8. The Husband is liable, during the Marriage, to pay her moveable Debts; but how ſoon the Marriage is diſſolved, he is no further liable to pay her Debts, than in as far as he was a Gainer by her Eſtate, or that there was ſuch Diligences done againſt him, during the Marriage, that affects his Eſtate, either heritable or moveable (*d*).

(*c*) The *Jus mariti* is exerc'd in diverſe Inſtances, by the Husband, as Head of the Wife, and as chief Ruler of the Family. Now, tho' his Powers and Faculty in theſe Reſpects may be ſleeping, yet they can never die, or be extinguiſh'd by Diſcharge or Renunciation, either before the Marriage, or during the ſtanding of it; for they're intrinſick and inherent in the Quality of a Husband, which, ſo long as alive, he can never ceaſe to be. Beſides, the *Jus Mariti* is manifeſted in Acts of Adminiſtration of the Wife's Eſtate immoveable, and in the unaccountable Management of her Moveables, theſe the Husband may, by antenuptial Stipulations, either wholely paſs over to the Wife her ſelf, or to her Truſtee; or, he may limit or reſtrain them; but ſuch proviſions made *ſtante Matrimonio*, and extrajudicially, would be revocable.

(*d*) The Husband, while the Marriage exiſts, paſſively liable to pay the whole perſonal

9. If the Wife contract any Debt, or do any other Deed after the Proclamation of *Banns*, the Husband will not be thereby prejudg'd.

10. The Husband is also oblig'd to Aliment his Wife, and if he refuse, the *Privy Council*, or *Lords of Session will modify an Aliment* to her out of her Husband's Means, suitable to his Quality, which they will also grant, *ob sævitiam*, if he treat her *inhumanely* (e).

11. The Husband is Curator to his Wife, and therefore if she had Curators

or moveable Debts contracted by his Wife before Proclamation of their Marriage, tho' the Debt should exceed the Estate he got with her, and even tho' she had nothing, because, *quem sequitur commodum, eum sequi debet & incommodum*, i. e. He, who gets the Benefit, should bear the Burden; yet he'll be looked from this Obligation, if, before Dissolution of the Marriage, his Person or Estate be not attach'd, the one by Imprisonment, and the other by Decreets of Furthcoming, or of Adjudication. If the Debt be principal Sums bearing Annualrent, the Interest must be paid during the Marriage, by the same Rule as moveable Debts; but the Husband is not liable for the Principal, further than he is *lucratus*, i. e. hath got with his Wife more than a suitable Tocher, or more than what may serve to defray the Charge of living in a married State, and this *Quota* is *in arbitrio* of the supreme Judge, who is to consider all Circumstances, *æquum & bonum*.

(e) The Commissars of *Edinburgh* have Jurisdiction, and are in use, to modify Aliments.

Curators formerly, their Power is devolved over by the *Law* upon the *Husband*; and whatever Deeds she does without his Consent are null, whether she be *Major* or *Minor*, and when she is cited, he must be cited for his Interest; and if she marry during the Dependence of a Process, the Husband must be called by *Letters of Suplement*. Tit. 6.

12. Beause the sole *Administration*, during the Marriage, belongs to the Husband; Law hath secured the Wife, that she cannot oblige her self when she is clothed with a Husband, albeit with his Consent; and therefore all Bands and Obligations granted by a Wife, *stante Matrimonio*, are, *ipso jure*, null; but if she oblige her self *ad factum præstandum*, she will be liable, as if she should oblige her self to infeft any Man in Lands properly belonging to her self (*f*).

(*f*) The meerly personal Obligation of a married Woman for a Sum of Money due by borrowing, as the Price of Goods, tho' *in rem versam* of the Husband, and verifyed by Writing, sign'd either without, or with her Husband, is, *quoad* her and her Successors, *ipso jure*, null from the Beginning thereof, and for ever: And tho' her Deeds which actually affect, and immediately touch her Estate, as Securities and Conveyances, either perpetual or temporary, simple or conditional, will stand; yet it may be doubted, if a personal Obligation to grant such Deeds will be an effectual and a good Ground of Adjudication in Implement.

Donatio inter virum & uxorem.

13. DURING the *Marriage*, all *Donations* made betwixt Husband and Wife are revocable at any Time in the *Donor's* Life, (except in so far as they are suitable *Provisions*) lest otherways they might ruin themselves, through *Love*, *Fear*, or *Importunity*; and that either expresly, by revoking what is done (though they obliged themselves not to revoke) or tacitly, by disponing to others, what was so gifted (f).

14. ALL Rights made by a Wife to her Husband, or any third Party with his Consent, and to his Behoof, are valid Rights; if they be ratified by her before a Judge, before whom she is to declare *without the Presence of her Husband, that she was not compelled to do that Deed, and swear that she should never quarrel the same*; whereas, if they be not ratified, they may be quarrelled, as extorted *vi & metu*, or may be revoked, as *donatio inter Virum & Uxorem*, which, the *Ratification* before any Judge do's absolutely exclude, *propter Religionem Sacramenti*, the Ratification being *extra præsentiam mariti* though she was forced (g). 15. MAR-

(f) The Expression in the Text, *At any Time of their Life*, I have changed into, *At any Time in the Donor's Life*.

(g) The Deeds of a Wife touching her Estate, made voluntarily, and freely, are valid, without judicial Ratification; but because the Wife's Circum-

15. MARRIAGE is dissolved, either by *Death* or *Divorce*; and if the Dissolution of the Marriage be by *Death*, there is a Difference, if the samen be within Year and Day of the Marriage, or thereafter? For if either the Husband or the Wife die within the Year, all Things done *intuitu Matrimonii*, became void, and return to the same Condition they were in before the Marriage; except there be a living *Child procreate of the Marriage, who was heard cry.* Tit. 6.

Circumstances within Doors, may differ, and be other than what they appear to be without, a judicial Ratification is convenient, because Imbecillity is natural to Women, and Submission to the Husband dutiful in a Wife, who, upon many Occasions suffer perforce what they have no Inclination to: And seeing the Law presumes, that Deeds manifestly prejudicial, have been involuntary; therefore, pursuant to the Favours bestow'd on the Sex, and that the Constraints are Domestick; upon the Wife's instructing her Complaint, even in a faint and imperfect Manner, she will be redressed. To avoid this Hazard, to which those, who Bargain in Things belonging to a married Woman, either in Property, or in Liferent, are expos'd, the Law provides the judicial Ratification mentioned in the Text, which maintains the Conveyance, albeit the Wife had been forced to grant it, and that *propter religionem fœramenti*.

The Decision relative to this Section in the Appendix of Notes, subjoin'd to former Editions, *Feb.* 15. 1678, *Gordon* against *Maxwell*, seems to have in it more Subtility, than Equity.

16. If the Marriage be dissolved by *Death* after the Year expires, then the Wife surviving has Right to a Third of the moveable Estate, if there be Children, and to the half if there be none, and this is called *jus Relictæ*; and though this Right does not hinder the Husband to give or dispose upon his Moveables in his Life, yet *he cannot do any Deed to defraud his Wife of this Right*, the Fraud being palpable: She has also a Right to a *Life-rent of the Third of the Lands*, wherein he *died infeft*, and this is called a *Widows Terce*, and to any other Provisions contained in her Contract of Marriage: And if she be provided to any particular Provision, she is excluded from a *Terce* †; *Nam in hoc casu provisio hominis tollit provisionem Legis*, unless her *Terce* be expresly reserved. A Wife has Right to her *Paraphernalia*, exclusive both of the Husband's *Dominium* and *Administration*, by which is meant her wearing Cloaths and Jewels; and the Husband surviving, has Right to the Tocher: And if he marry an *Heretrix*, he has Right to all her Lands after her Death, during his own Life, if there be a Child of the Marriage who was heard cry, and this is called, *The Courtesie of Scotland* * (b).

Jus Reli. &c.

Terce.

† K. C. II. Par. 3. Act. 10.

Paraphernalia.

Courtesie of *Scotland*.

* Reg. Ma. lib. 2. c. 3. Leg. 8. Burg. cap. 44.

17. Mar-

(b) Before the Act 10. *Par.* 1681, a Wife provided to a Dowry, or other pactional Jointure

17. MARRIAGE may be either declared to have been null *ab initio*, for *Impotency, Contingency* of Blood, or that either Party ſtands married; or elſe it may be diſſolved for Adultery. The Cogniſion of all which belongs to the Commiſſars of *Edinburgh* privatively, or for wilful *Deſertion*, to be purſued by an Action for *non adherence*, either before the *Commiſſars* of *Edinburgh*, or any inferior *Commiſſar*, to whoſe Juriſdiction the Parties are liable, after malicious diverting for four Years, they being thereupon (after due Admonition to adhere, and Citation for that effect) excommunicated; which Sentence being pronounced, is a ſufficient Cauſe of *Divorce* †: In which Caſes the Purſuer muſt give his Oath, that the *Proceſs* is not carried on by *Colluſion*; and after a Decreet of *Divorce* is obtained in either Caſe, the Party innocent may marry; but the Party that is guilty, cannot, and beſides, loſes all the Benefit that they could expect by the Marriage (*f*).

† K. J. VI. Par. 4. Act 15.

ment, had moreover Right to a Terce of Lands, &c. which is a legal Proviſion, unleſs ſhe was, by her Marriage Contract, ſecluded from it; but ſince that Act, a Wife ſettled in a Jointure hath no Claim to a Terce, unleſs it be ſpecially ſo ſtipulated.

(*e*) If the Wife be guilty, the Husband is freed from all pactional or legal Proviſions for a Jointure made to the Wife, in caſe of her Surviving,

vidence, and moreover he retains the Tocher, and all Effects he got during the Marriage, *Jure Mariti*, or otherways. On the other Hand, if the Husband is guilty, the Wife immediately enters to the Poſſeſſion of her Liferent provided to her after the Deceaſe of her Husband, who, in this caſe of Divorce, is in Conſtruction of Law, and in Reſpect to her, Civilly dead: Beſides, ſhe may ſeek back her Tocher, if it has been paid; or retain it, if not paid.

TIT. VII.

Of Minors, and their Tutors and Curators.

WHILST Perſons are within *Twenty one Years*, the Law preſumes them to want that Firmneſs of *Judgment*, which is requiſite for the exact Management of their Affairs; and during that Time, they are called *Minors*, by a general Term; though properly, ſuch only are called *Minors*, who are paſt *Pupillarity*, which laſts in *Males* till *Fourteen*, and in *Females* till *Twelve*.

Minors

2. TUTORY may be defined, a *Power and Faculty to govern the Eſtates and Perſons of Pupils*; and the Law gives *Tutors* and *Curators* for the *Management* of their *Affairs* (*a*).

Definition of Tutory.

3. THERE

(*a*) It is the common Saying or Brocard of the Civilians, *Tutor datur Perſonæ, Curator Rei.*

3. THERE are three Kinds of *Tutors*, viz. *Tutor nominate*, *Tutor of Law*, and *Tutor dative*. *Tutor nominate* (who is likewise called *Tutor Teſtamentar*) is he, who is left *Tutor* by the Father in his *Teſtament*, or any other *Writ*, and he is not obliged to find *Caution*, or give his *Oath*, *De fideli adminiſtratione*; becauſe, it is preſumed, the *Parent* hath choſen a ſufficient Perſon. Tit. 78 Diviſion of Tutors. Tutor Teſtamentar.

4. THE *Father* only can name *Tutors*; but, if the *Mother*, or even a Stranger, *give or diſpone* any Thing to a *Child*, they may name a *Tutor* to manage what they give; but, if there be no *Tutor* nominate, or, if he accepts not, then there is Place for a *Tutor of Law*, who is ſo called, becauſe he ſucceeds by *Law*, and generally, the neareſt *Agnate*, (for ſo we call ſuch as are related by the *Father*) who is to ſucceed to the *Minor*, being paſt *Twenty five Years*, and would be *Heir* to him, is his * *Tutor in Law*: He takes a *Brief* out of the *Chancellary*, and *ſerves himſelf before any Judge*, to whom it is directed, and the *Tutor of Law* muſt find *Caution* before he *adminiſtrate*. Tutor of Law. *K. JHI. Act 30.

5. IF he do not *ſerve* within a *Year* after the Time he might have ſerved, then any Perſon may give in a *Signature* to the *Exchequer*, and he gets a Gift under the *Privy Seal*, of being *Tutor dative*, and finds *Caution*, acted in the *Books of Exchequer*. Tutor dative

But,

But, of old, they found *Caution* in the *Commissar's Books*: This *Tutor*, and he only, is obliged to make *Faith*, *De fideli administratione* (*b*).

6. If there be more *Tutors* than one, the *major Part* must all consent; but the *Pupil* needs not *subscribe* with his *Tutors*, though a *Minor* must subscribe with his *Curators*: But, if there be a *Tutor*, *sine quo non*, he must always be one of the Managers and Consenters.

7. After the Years of *Pupillarity*, there must be a Summons raised at the *Pupil's* Instance, summoning some of the *Father's Side*, and some of the *Mother's Side*, upon nine Days Warning, to appear before any *Judge*; and, at the Day, the *Minor* gives in a List of those he intends to choose to be his *Curators*, and those who accept, must subscribe the Acceptation, and they must find Caution *de Fideli* *; upon all which, the *Clerk extracts an Act*, which is called, *An Act of Curatory*: There uses to

Curators.

*Q. Mary Par. 6. Act 35.

(*b*) At passing this Signature, a Summons executed against two of the nearest in Kin on the Father's Side, and against as many on the Mother's Side, cited to that, or to some other Day past, is called, to the End they may be heard, on what they have to say, against the Person to whom the Gift is to be granted, without which, Citation, or Consent under the Hands of the said nearest in Kin, to be expresst in the Gift of Tutory, the Signature is null, by Way of Exception *Act 2. Parl. 1672.* towards the End.

to be ſometimes *Curators*, *ſine quibus non*, Tit. 7. and the *major Part* with theſe are ſtill a *Quorum*, except the *Minor*, in his *particular Election*, hath appointed otherwiſe; for the *Quorum* is in the *Minor*'s Power, and the *Act bears* how many ſhall be a *Quorum* (c).

8. THERE are theſe *Differences* betwixt *Tutors* and *Curators*, that *Tutor datur Perſonæ, Curator Rei*; a *Tutor acts* and *ſubſcribes* for his *Pupil*, a *Curator* with him; but both muſt make *Inventary* of all the *Pupil's Eſtate*, before they *adminiſtrate*, with Conſent of the neareſt of *Kin* on both Sides; and, if they neglect to make *Inventary*, they will get no *Expences* allowed them during their Adminiſtration, and may be removed from their Offices, as ſuſpect *; neither have *Salaries*: And both are liable to *compt*, but not till their *Office expire*, as both have *Action* againſt their *Minors* for what they *profitably expended* during their *Adminiſtration*, which is called *Actio tutelæ contraria*.

Difference betwixt Tutors and Curators.

Inventary.

* K. C. II. Par. 2. Seſſ. 3. Act 2.

9. IF the *Minor* have *Curators*, and do any Thing without their Conſent to his Preju-

(c) This Summons at the Inſtance of the Minor, muſt be executed againſt two of the neareſt in Kin on the Father's Side, and againſt as many on the Mother's Side, citing them to compear before the Minor's Judge Ordinary and Competent, to aſſiſt, and give Conſent, why any of the Perſons to be named, ought not to be thereſted.

Prejudice; (for he may make his Condition better without them, but not worse, the Advantage being evident and without *Hazard*) then that Act is *ipso Jure null*, that is to say, he needs not *revoke*; but, if he have no *Curators*, then any Act, he does to his own *Prejudice*, is valid; but he must reduce the same thus, *viz.* he must write a *Revocation*, and subscribe it before *two Witnesses*, and *registrate* it, and thereupon he must raise and *execute* a *Summons* of *Reduction* of that Act, *ex capite Minoritatis & læsionis*, before he be 25 *Years of Age*, wherein he must make appear, he was both *Minor*, and was *lesed*; otherwise the *Lords* will not repone him: Though this *Revocation* be not absolutely necessary, yet the *executing* of a *Summons* before 25, is absolutely necessary: And, though a *Minor swear* not to *revoke*, yet this *Oath* is declared null by *Law*, and the *Eliciter* of it punishable and infamous*; but, if he *fraudulently circumveen* another, by saying he was *Major*, he will not be restored against his own *Fraud*.

* K. C. II. Par. 3. Act 19.

10. A *Tutor* or *Curator* cannot pursue his *Pupil*, till he has *compted* for his *Intromissions* (*d*); for it is presumed he has his *Pu-*

pil's

(*d*) By *Act* 9. *Parl.* 1696. It is ordained, *That all such Actions of Compt and Reckoning, competent to Minors, against their Tutors or Curators, or competent to Curators against Minors, not pursued,*

and

pil's Estate in his own Hands, and, whatever Right he buys, affecting the Estate of his *Pupil*, is presum'd to be bought with his *Pupil*'s Means; and so the Advantage must *accresce* to the *Pupil* Tit.

11. So careful has *our Law* been to *protect Minors*, and to secure *old Estates*, that *minor non tenetur placitare super hæreditate paterna* *; that is to say, a *Minor* is not obliged to answer any Process that may evict his *Father's Heritage*; but yet, if his *Father's* Right be quarrelled for his *Father's Crimes* or *Delicts*, as in the Cases of *Falshood*, *Forfeiture*, or *Recognition*; these Cases are excepted, and he is obliged to answer. *Secundo*, This Privilege extends not to *Actions* concerning *Marches*, or *Division of Lands*. *Tertio*, It defends not against the *Superior*, *pursuing* for his *Casualities*. *Quarto*, Where the *Minor*'s Right is only *quarrell'd*, *consequentially*, the *chief Right quarrelled* belonging to a *Major*, there is no Place for this Privilege. *Quinto*, It defends not in Cases where the *Heritage* was *deriv'd* from *Collaterals*, such as *Brothers* or *Uncles*. *Sexto*, It defends only where

* Statut. a Will. c. 39.

and insisted in for the Space of Ten Years, after Majority of the Minor, or after his Decease, in case of his dying in Minority, shall prescrive forever: And all Actions of this Nature raised, or competent to be raised, shall prescrive within Ten Years after the Date of that Act, which is September 25th, 1696. But it is thereby declared, *That this Prescription shall not run against Minors.*

where the *Heritage* descended even from the *Father* or *Grandfather*, if they died in peaceable Poſſeſſion, and if no *Proceſs* was intented againſt them in their own *Life-time*. *Septimo*, It takes only Place, where the *Father* was *actually infeft*; but then it is *accounted Heritage*, though it was *conqueſt* by the *Father* (e).

12. The Privilege of *Minority* is in ſome Caſes allowed to the *Minor's Heir*: Which are compriſed in theſe following Rules. 1. If a *Minor* ſucceeds to a *Minor*, the Time of *Reſtitution is regulated* by his own *Minority*, and not by his *Predeceſſors*. 2. If the *Predeceſſor* be *Major*, and *intra quadriennium utile*, *Reſtitution* is competent during the *Heir's Minority*; but he has no further of the *anni utiles*, than remained to the *Defunct* the Time of his *Deceaſe*. 3. If a *Major* ſucceed to a *Minor*, he has only *quadriennium utile*, after the *Minor's Deceaſe*, or ſo much thereof, as was *unexpired* at that Time. But this Privilege of *Minority*, as to the *Expiring* of the *Legal of Appriſings*, is *ſpecial* and *ſingular*; *Vide infra*, Tit. *Appriſ.* and *Adjud.* (f).

13. Minority ends in both Men and Women, when they are 21 *Years of Age compleat*; but after that, there are 4 *Years granted*, wherein they may *reduce* what they did to their *Læſion* and *Prejudice* during their

(e) See June 23, 1625. *Pringle* againſt *Ker*.
(f) See Book II. Tit. 12. § 3, and 4.

their *Minority*; and these Years are called *Anni utiles*, or *quadriennium utile*. Tit. 7.

14. If a Man be an *Idiot*, or *Furious*, he must be found to be so by an *Inquest*, and thereafter his neareſt of *Kin may ſerve themſelves Tutors*; or the *Exchequer* may grant a *Tutor dative*, *if they ſerve not*; but the *Tutor in Law* will be preferred to that *Tutor dative*, offering to ſerve *quandocunque*, and it muſt be proved to the *Inqueſt*, at the Time of the Service, that he is *furious*, and when he began to be ſo, and all Deeds done by *him after that are null*, not only from the *Date of the Service*, but from the Time that he was *found* to be *Idiot*, or *furious*. Idiotry or Furioſity, * K. J. VI. Par. 10. Act 18.

15. If a Perſon be *Prodigal* or *Spendthrift*, he *interdicts himſelf*, either *voluntarily*, which is done by a *Band*, whereby he obliges himſelf to do nothing without the Conſent of ſuch Friends, as he therein condeſcends upon; and theſe are therefore called the *Interdictors*; and, if this *Narrative be falſe*, ſo that the Perſon is not *improvident*, as he relates in the *Bond*, this *voluntar Interdiction* will be reduced. *Secundo*, *Interdiction* proceeds upon a *Purſuit*, at the Inſtance of the *neareſt of Kin*, againſt the *Prodigal*, whom the *Lords* will *interdict*, if they ſee Cauſe: Or, 3*dly*, Though there be no *Purſuit*, yet, if in another *Proceſs* they find he has been often, or is *obnoxius* to be cheated, they will *interdict* Prodigals and their Interdiction.

Book I. terdict him, ex proprio motu, and these two last are called *Judicial Interdictions*; and no *Interdiction* lasts longer than the *Levity* and *Prodigality* which occasioned it; but this requires also the Sentence of a *Judge*.

16. UPON this *voluntar Band* the *Lords of Session* grant *Letters of Publication*; and after these *Letters* are published at the *Market-Cross of the Head-Burgh of the Shire*, where the *Person interdicted dwells*, and are *registrated*, the *Person interdicted* can do nothing to the *Prejudice of his heritable Estate*, otherwise the *Interdictors* may *reduce* these Deeds, as done after the *Publication of the Interdiction*; (for Interdictions extend only to *Heritage*) but yet the Person himself is still liable to *personal Execution*, even upon these Deeds done after *Interdiction* (g).

Letters of Publication.

17. A

(g) Albeit, one duly interdicted can do no Deed, which directly toucheth his Land Estate, as the giving Dispositions, Wadsets, Infeftments of Annualrent, or of Liferent, &c. yet he may grant personal Obligations, on which, in Form of Law, Execution and Diligence may be raised against his Person, and against his Moveables, as Arrestments and Forthcomings: As also, upon his being denounced and registred at the Horn, his Escheat single, and Liferent will fall; because, the Gifts of such become extinct, by the Decease of the Rebel, and only extend to moveable Goods, and to Rents of Lands, uplifted by the Party interdicted, from which the Interdictors cannot debar him; unless, by the Tenor of the Bond of Interdiction, these Rents in whole, or in part, be allocated for special Uses, as for Aliment of the Family, or for Payment of Debt.

17. A *Father* is likewise in *Law Administrator* to his own *Children*; that is to say, is both Tutor and Curator to them, if they fall to any Estate, during their Minority; and if either Pupil or Minor have any *Legal Action to prosecute*, and want Tutors and Curators, the Lords, or any other *Judge*, before whom the Process is depending, will, upon a Bill, authorize Curators, who are therefore called *Curatores ad lites*. Tit. 7. § 2. Administrator in Law.

18. TUTORS and Curators are not Proprietors, but Administrators; therefore, they can only manage rationally, and do every Thing for the Utility of the Pupil, but even this Administration does not impower them to sell Lands, or to renounce any heritable Right belonging to the Pupil, except for paying of Debt, in which Case, they must have a Decreet for their Warrant; nor does it impower them to set Tacks for longer Time than their Office lasts: Nor can any Tutor be *auctor in rem suam*, by authorizing the Pupil to do any Deed for his own Advantage, such as, to become Principal or Cautioner for him to a third Party (*b*).

E 19. ALL

(*b*) To render a judicial Sale of a Pupil's Lands formal and firm, there's a Summons for that End, which hath its proper Stile raised before the Lords of Session, that it may be by them found, it is necessary and profitable for the

Book I.

Diligence of Administrators, Pro-Tutors.

19. ALL these *Tutors, Curators* and *Administrators*, or any who behave as such, and who are called in our Law *Pro-Tutors*, are liable to do exact Diligence; and therefore, if any of their Pupil's Debitors become Bankrupt, or their Tenants break, they are liable *in Solidum*, so that the Pupil may pursue any one of the Tutors for the Negligence of all the rest, but such Tutor has his Relief against the rest.

20. THEY are likewise liable to put the Minor's Rents out upon Annualrent within half a Year, or a Term, after they receive them, and to put out his Money upon Annualrent within a Year, both which Times are allowed to get good Debitors; but, if his Bands bear Annualrent, they are only obliged to take in these Annualrents once during their Office, and

to

the Pupil to sell all his Lands, to the End the Price may be applied for paying Debt: In this Process, they examine Witnesses upon the Rental, and the Value of Lands sold in that Shire, in which they ly; and the Lords, finding the Sale necessary, appoint a Day on which the Lands are exposed to publick Roup, and are judged to belong to the highest Offerer; (in the same Manner, as is practised in the Sale of a Bankrupt's Estate) tho' this Order is absolutely required in the Case of Tutors, yet Minors without such Precaution, may, with Consent of their Curators, directly sell their Lands to the best Advantage.

to turn them in to a principal Sum, bearing Annualrent (*i*). Tit. 7.

22. AFTER *Tutors* and *Curators* have once accepted, they cannot renounce; but, if they miscarry or *malverse* in their Administration, they may be removed by an Action, as suspect *Tutors* (*k*).

(*i*) For clearing further this Section, one must distinguish between Money Rent, and Victual Rent, and even in Money Rent there is a Difference between Rent of Lands, and Annualrent of Sums. 2. Between Rent due before the Tutor's entring to the Office, and that due during the Office. And, *Lastly*, After the Expiration thereof. And, *First*, A Tutor after his Acceptation of the Office, must, within Year and Day, receive and gather in the whole Moneys, Rents, Annualrents, Price of Victual, and of other such like perishable Goods; and Debts being paid, he is to lend, upon Interest, what remains, after retaining a suitable Aliment to the Pupil. 2. During the Office, the Tutor is to uplift the Money Rent of his Pupil's Lands, and, within a Year after it falls due, to lend it upon Interest; and, if the Land Rent be paid in Victual, he has Year and Day after the Term of Payment, for making Money of it, after which it is to be lent, *&c.* 3. Towards the ending of his Office, or after Expiration thereof, he is to gather in the whole Annualrents due from the Beginning to the End of his Tutory, and thereof to make a principal Sum to be lent on Annualrent. If he neglect, or do not sufficient Diligence, *&c.* he himself is accomptable for the Annualrents.

(*k*) A Tutor or Curator must continue in the Office, till it end, for he cannot sooner be dismissed, otherwise than by Process before the Lords, wherein he complains, and shall prove that the Pupil or Minor is become unmanageable.

22. If there be more *Tutors* or *Curators*, the *Office*, upon the Death of any of them, *accresces* to the *Survivors*, except they be named jointly; for then the first Nomination is dissolved by the Death of any one of them, the *Defunct* not having trusted any one; and for the same Reason, if a certain Number be declared a *Quorum*, the Nomination fails; if so many die, as that this Number *survives* not, nor does the *Office accresce* to such as *survive* (*l*).

Slavery and *Patria potestas.*

23. We have little Use in *Scotland*, of what the *Institutions of the Roman Law* teach concerning *Slavery*, or *Patria potestas*; for we, as *Christians*, allow no Men to be made

(*l*) Thus far our Author hath treated his Title according to the standing Law in his Time: But, that the Reader may have a View of a very remarkable Addition; It is fit to know, That Curators now a Days, are either nominated by a Father, or they're of the old Kind, elected by a Minor after his Pupillarity. This Division arises from *Act* 8th, *Parl.* 1696. By which it is statuted, *That a Father may, by any Deed in* Liege Poustie, *make Nomination of Persons he thinks fit to be Tutors or Curators to his Children, during their Minority, containing Provision, that they, the Tutors or Curators, shall not be liable for Omissions, but only for their actual Intromissions with the Estate descended from the Father; and that each of them shall be liable for himself only, and not* in Solidum, *or for others. And it is ordained accordingly, and further declared, That Persons named to be both Tutors and Curators, are free to accept the one, and to decline the other: But, if the Condition of such shall change, the Lords of Session can oblige them either to find Caution, or to remove.* See the Act.

made *Slaves*, that being contrary to the *Christian Liberty*. And the *Paternal Power*, & *Patria potestas*, has little Effect with us; for a *Child* in *Family* with his *Father*, acquires to himself, and not to his *Father*, as in the *Civil Law* (*m*).

(*m*) We have Houses of Correction. See *Act* 74. *Parl.* 1579. *Act* 58. *Parl.* 1597. *Act* 18. *Parl.* 1672. &c. We have *quasi* Slaves, called among the *Romans*, *Ascriptitii Glebæ*, viz. Coalliers and Salters, *Act* 11. *Parl.* 1606. *Act* 56. *Parl.* 1661. and others found in the *Index* of the Acts of Parliament, under the Title of *Beggars*, *Poor*, *Vagabonds*, and the like. We have hired Servants, who are under a Kind of Compulsion, *Act* 8th, *Parl.* 1617. *Act* 38. *Parl.* 1661. *Act* 21 *Parl.* 1621. We have Apprentices subject to the Laws of the Burgh, and their respective Corporations, who, during the Time specified in their Indentures, are under the Lash of their Masters and Mistresses, and sometime in a Condition worse than that of an Hireling, and little better than that of a Slave.

Parents can be compell'd to educate their Children according to their Ability, to put them to Trades; and the Children of Gentlemen not able to maintain themselves, are intitled to demand from their Parents a Subsistance. As, on the other Hand, Children are bound to aliment their poor Parents.

If a Child hath a separate Stock, and carry on a Trade distinct from his Father, tho' he get in the Family Diet and Lodging, yet the Gain is his own, and can't be touched by his Father, or his Creditors: It is other Ways, if the Son be either Apprentice or Journeyman to his Father, work on his Stuff, or be set on the Management of his Father's Merchandice, or Trade; albeit, he may, at the same Time have a *Peculium*, a Portion of Goods of his own, and proper to himself alone.

THE INSTITUTIONS Of the LAW of SCOTLAND.

BOOK II.

TITLE I.

Of the Division of Rights, and the several Ways, by which a Right may be acquired.

BEING to treat in the *Second Book* of Things themselves, to which we have Right, and how we come to have Right to them, it is fit to know.

2. THAT *Dominium* or *Property is the Power of using and disponing what is ours, except in so far, as we are restricted by Law*

or

or Paction: And the Law designing the general Good, allows us not to use our own, so as thereby chiefly to prejudge our Neighbour. *Et in æmulationem vicini.* Tit. 1.

3. The Property of every Thing belongs to some Persons, or Society, and cannot float in an Uncertainty: *Nam dominium non potest esse in pendenti.*

4. Some Things do not fall under *Commerce*, and so we cannot acquire any Property in them, such as Things common; as the *Ocean*, (though our *King* has *Right* to our narrow *Seas*, and to all the *Shores*.) *Secundo*, Things publick, which are common only to a *Nation* or *People*; *as Rivers, Harbours, and the Right of Fishing* in the said *Rivers*. *Tertio*, *Res universitatis*, which are common only to a *Corporation* or *City*, as a *Theater*, or the *Market-place*, and the like. *Quarto*, Things that are said to be no *Man's*, but are *Juris Divini*, which are either *Sacred*, such are the *Bells of Churches*, for, though we have no Consecration of Things since the *Reformation*, yet some Things have a *Relative Holiness* and *Sanctity*, and so fall not under *Commerce*; that is to say, cannot be bought and sold by Private Persons. *Quinto*, Things that are called *Sancta*; so called, because they are *guarded from the Injuries of Men*, by special *Sanctions*, as the *Walls of Cities*, *Persons of Ambassadors*, and *Laws*. *Sexto*, Division of things.

Things *Religious*, such as *Church-Lands* (*a*).

Ways of acquiring Property.

5. As to those Things which fall within Commerce, we may *acquire Right to them*, either by the *Law of Nature and Nations*, or by our *Civil and Municipal Law*. *Dominion* or *Property* is acquired by the Law of Nations, either by our own *Fact* and *Deed*; or *Secundo*, by a *Connection* with, or *Dependence* upon Things belonging to us; the first by a general Term is called *Occupation*, and the last *Accession*.

6. Occu-

(*a*) The *Civilians* make about five *Characteristicks* of Things, they reckon not to belong to any Person, which they sum up in the following Distick.

1. *Censura*, 2. *Fabe*, 3. *Natura*, 4. *Tempore*, 5. *Casu*.
Res in nullius dicitur esse bonis.

1. Things sacred, religious, and dedicated to pious Uses. 2. Things derelinquished or thrown away by the Proprietor. 3. Wild Animals, and precious Stones, or the like, way'd out of the Sea, and lying upon the Shore. 4. Treasures hidden in the Earth, or else-where. 5. The Estate of one deceased, which no Body claims.

Our Law reckons the first Sort not to be in Commerce, and the rest to belong to the King, or to those, who have got from him a Gift of them.

Burial-Places, and Seats in the Church, are number'd among Things religious, tho' they are commonly sold with Lands, and sometimes a Burial-place is reserv'd by the Representative of an ancient Family, Proprietors of the Lands sold, tho' the Person who reserves, hath not a Fur of Ground in the Parish.

6. OCCUPATION is the *appropriating and apprehending of those Things, which formerly belonged to none.* And thus we acquire *Property* in *wild Beasts*, of which we acquire a Right, how soon we apprehend them, or are in the Prosecution of them with Probability to apprehend them; as also we retain a Right to them, whilst they remain in our Possession, and even after they have escaped, if they be yet recoverable by us. *Secundo*, Property comes by Accession; as for Instance, a House built upon, or Trees taking Root in our *Ground*, and the Product also of our Beasts belongs to us, and Ground that grows to our Ground becomes insensibly ours, and is called *Alluvio* by the *Civilians* (*b*). And it is a general Rule in Law, that *accessorium sequitur naturam sui principalis*; and yet a Picture drawn by a great Master upon another Man's Sheet or Table, belongs to the *Painter*, and not to the Master of that whereon it is drawn; the Meanness of the one ceding to the Excellency of the other. Title. Occupation. Accession. Confusion.

7. THERE are many other ways of acquiring Right and Property, which may be referred either to *Occupation* or *Accession*; as if a Man should make a Ship of my *Wood*, it would become the Maker's, and would not belong to me to whom the Wood, Commixtion.

(*b*) Ground that grows insensibly to our Land.

Book II. Wood belonged: And this is called *Specification*, in which this is a general Rule, That *if the Species can be reduced to the rude Maſs of Matter, then the Owner of the Matter is alſo Owner of the Species, or Thing made*; As, *if a Cup be made of another Man's Silver, the Cup belongs not to the Maker, but to the Owner of the Metal*; becauſe, it can be reduced to the firſt *Maſs of Silver*: But, if it cannot be reduced, then the Species will undoubtedly belong to him that made it, and not to the *Owner of the Matter*; as *Wine* and *Oyle* made of another's *Grapes* and *Olives*, which belongs to the Maker, ſeeing Wine cannot be reduced to the *Grapes* of which it was made.

Specification.

8. PROPERTY is likewiſe acquired, when two or more Perſons mix together, in one what formerly belonged to them ſeverally; and if the Materials mixed be liquid, it is called by a ſpecial Name, *Confuſion*, as when ſeveral Perſons Wines are mixdd and confounded together: But if the Particulars mixt be dry and ſolid, ſo as to retain their different Shapes and Forms, it is called *Commixtion*; and in both Caſes, if the *Confuſion* or *Commixtion* be by Conſent of the Owners, the Body or Thing reſulting from it, is common to them all; but if the *Commixtion* be by chance, then if the Materials cannot be ſeparated, the Thing is yet common; as when

Confuſion.

Commixtion.

when the Grain of Corns of two Persons are mixed together by chance, here there must necessarily be a Community, because the *Separation is impossible*: But if two *Flocks of Sheep* belonging to different Persons, should by accident mix together, there would be no Community; but every Man would retain Right to his own Flock, seeing they can be distinctly known and separated, and these two ways of Acquisition are by Accession. Tit. 1.

Tradition

9. The last and most ordinary Way of acquiring of Property is by *Tradition*, which is defined *a Delivery of Possession by the true Owner, with a design to transfer the Property to the Receiver*; and this Translation is made either by the real Delivery of the Thing it self, as of a Horse, a Cup, &c. or by a Symbolick Delivery. As, is the *Delivery of a little Earth and Stone in place of the Land it self*: For, where the Thing cannot be truly delivered, the Law allows some Symbols or Marks of Tradition; and so far is Tradition necessary to the acquiring of the Property in such Cases, that he who gets the last Right with the first Tradition, is still preferr'd by our Law.

Acquisitio per inventionem.

10. If he who was once *Proprietar* does willingly quit his Right and throw it away, (which the *Civil Law* calls *pro derelicto habere*) the *first finder acquires a new Right, per inventionem*, or by finding it; by

by which Way alſo Men acquire Right to Treaſures, and to Jewels lying on the Shoar; and generally to all Things that belonged formerly to no Man, or were thrown away by them: But it is a general Rule in our Law, *That what belongs to no Man, is underſtood to belong to the King.*

Preſcription.

II. PRESCRIPTION is a chief Way of acquiring Rights by the *Civil Law*; but becauſe that Title comprehends many Things, which cannot be here underſtood, I have treated of Preſcription amongſt the ways of loſing Rights, it being upon diverſe Conſiderations, *Modus acquirendi & amittendi.*

Bona fides.

12. WE alſo acquire Right to the Fruits of thoſe Things which we poſſeſs, *bona fide*, if theſe Fruits were gathered in or uplifted, and conſumed by us, whilſt we thought we had a good Right to the Thing it ſelf (*c*): For though thereafter our Right was found not to be good, yet the Law judged it unreaſonable, to make us reſtore

(*c*) Tho' the executing a Summons interrupts Preſcription, yet will it not put a Defender in *male fide*, which, according to the preſent Practick, will ſcarce begin when the Libel with the Purſuer's Titles are ſeen and returned by an Advocate for the Defender; but Litiſcontestation puts one in *male fide* after the date of the Act extracted. And even before that ſtep of

restore what we look'd upon as our own, when we spent it; and therefore when this *bona fides* ceaseth, which may be several ways, especially by intenting an Action at the true Owner's Instance, we become answerable for these Fruits; though thereafter they be *percepti & consumpti* by us.

Tit. 2.

of Procedure, a Defender who looses an Arrestment raised upon the depending Process, is accountable for the Rents arrested, and uplifted by him.

TIT II.

Of the Difference betwixt heritable and moveable Rights.

HAVING in the former Title cleared how we acquire Rights, we come now to the Division of them.

2. The most comprehensive Division of Rights amongst us, is that, whereby they are divided into heritable and moveable Rights.

Heritable and moveable Rights.

3. Heritable Rights, in a strict Sense, are only Lands; and all Sums of Money, and other Things, which can be moved from one Place to another, are moveable; but that is only counted heritable in a legal Sense, which belongs to the

the Heir as all other Things, which fall to the Executor are moveable; and ſo Sums of Money, albeit, of their own Nature, they are moveable; yet if they were lent for Annualrent, they were of old reputed heritable.

Annualrent.

4. For underſtanding whereof, it is neceſſary to know, that albeit, by the *Canon Law*, all Annualrents were forbidden, as being contrary to the Nature of the Thing, (Money being barren of its own Nature;) yet the reformed Churches do generally allow it; nor were the *Jews* prohibited to take Annualrent from Strangers.

Bands heritable and moveable.

5. Before the Year 1641, all Bands and Sums bearing Annualrent were heritable as to all Effects, ſo that the Executor who is *Hæres in mobilibus*, had no Intereſt in, nor ſhare of ſuch Bands, but they belonged intirely to the Heir: But that Parliament finding that the reſt of the Children, beſide the Heir, had no Proviſion by our Law, except an equal ſhare in the Moveables; they therefore ordain'd that all *Bands for Sums of Money ſhould be moveable, and ſo belong to the Executors; except either the Executors were ſecluded*, or the *Debitor were expreſly obliged to infeft the Creditor*, which is likewiſe renewed ſince the King's Reſtauration*: For in theſe Caſes, it was clear, that by the Deſtination of the Defunct, (which is the great

* K. C. Par. 1. Act. 32.

Teſt

Teſt in this Caſe) theſe Sums were to be heritable; and yet all Sums bearing Annualrent, are ſtill heritable, in ſo far as concerns the Fisk, or the Relict; ſo that if a Band bear Annualrent to this Day, the Fisk cannot claim any Right to it, as falling under the Rebel's ſingle Eſcheat, (whereby when he becomes Rebel, all his Moveables fall to the King;) nor has the Relict any Right to a third of them, as ſhe has to a third of other Moveables, the Law having preſumed that Relicts will be ſtill ſufficiently ſecured by their Contracts; but whether the *Sum be heritable or moveable*, all the *bygone Annualrents*, and generally all *bygones are moveable*, as to all Intents and Purpoſes, and ſo fall to Executors, and to the Fisk, and to the Relict; becauſe bygone Reſts are looked on as Money lying by the Defunct, they being already payable, as all Obligations bearing a tract of future Time belong to the Heir.

Heritable *quoad Fiſcum & Relictum.*

6. So far does the Law defer to the Will of the Proprietars, in regulating whether a Sum ſhould be *heritable* or *moveable*; (the Law thinking that every Man is beſt Judge how his Eſtate ſhould be beſtowed,) that if a Man deſtinate a Sum to be imployed upon Land or Annualrent, this *Deſtination* will make it heritable, and to belong to his Heir; or though the Sum was originally ſecured by a *moveable Band*, yet

Sums heritable by Deſtination.

yet it may become *heritable*, by the *Creditor's* taking a *supervening heritable Security for it*, or by comprising for his *Security*. But yet the *Creditor's Design* is more to be considered than the *supervenient Right*. As for Instance, if one take a *Gift of single Escheat* for securing himself in heritable Sums, this does not alter the Nature of the former *heritable Right*: Further, a Sum may be moveable *ex sua natura*, and yet may be secured by an *heritable Surety*; as in the Case of bygone Annualrents, due upon *Infeftment of Annualrent*, which are unquestionably moveable of their own Nature, and yet they are heritably secured; and even *Executors* may recover them by a real Action of Poinding of the Ground. And, if a *Wadset* bear a Provision, *That notwithstanding of Requisition, the Wadset shall still subsist*, the *Requisition* will make the Sum moveable, though it continue secured by the *Infeftment*; as also Sums *ab initio* heritable, may be secured *by* an *accessory moveable Security*, without altering their Nature.

7. THOUGH a Sum be *heritable*, yet if the *Creditor* to whom it is due require his Money, either by a *Charge* or *Requisition*, it becomes *moveable*; for the Law concludes in that Case, that the *Creditor* designs rather to have his Money, than lying in the *Debitor's* Hands upon the former *Security*; and if it were lying in Money

ney beside him, it would be moveable; and a *Requisition* to one of the Cautioners will make it *moveable*, as to the *Principal* and all the other Cautioners; But a Charge on a Band, wherein Executors are included, will not make the Sum moveable; *for the Design of the Creditor is presumed to continue in favours of the Heir*, till the Sum be paid, or the Band innovated: And for the same Reason, a Requisition used by a Wife, who has an heritable Sum, that falls not under the *Jus Mariti*, will not make it moveable, since it is presumed, she designed only to get Payment; but not to give it to her Husband (*a*).

Tit. 2.

8. But if the Creditor, who required his Money, take Annualrent *for Terms due* after that Requisition, it is presum'd, that he again altered his Inclination, and resolved to have it heritable, and to continue due by virtue of the first Security (*b*).

9. Though a Band be heritable, as bearing Annualrent, yet, before the Term of Payment, it is moveable as to all Persons (*c*).

10. From

(*a*) Yea, actual Payment to the Wife will not alter the former Quality of a Sum, so long as she retains the Money in her own Custody; much more so, if she lend it on a Security like to the former.

(*b*) I have added these Words, *for Terms due.*

(*c*) i. e. Before the Term stipulated for paying Annualrent, which, when payable at two Terms, sometime happens to come sooner, than the Term for Payment of the Principal.

2do, From all which it is clear, that some Sums are moveable, as to the Executor, but not as to the Fisk or Relict; and some may be moveable, as to the *Debitor* and his *Executors*, and yet may be heritable as to the *Creditor*, and these representing him; as for Instance, an Obligation to imploy a Sum due by a moveable Band upon Land or Annualrent for the Heirs of a *Marriage*, that Sum, as to the *Creditor*, would be *heritable*; yet *quoad* the *Debitor*, it would remain *moveable* (*d*).

(*d*) If the Creditor be denounced and registred to the Horn before the Term of Payment, the Principal, tho' bearing Annualrent from the Date of the Bond, falls under Escheat, and if the Creditor die before the Principal or Annualrent is due, the Captital Sum is in *jure Relictæ*. And, in like manner, Tacks, which are for Years to run, are in *jure fisci*, while neither the Relict, or the Executor of the Tacksman have benefit thereby.

TIT. III.

Of the Constitution of Heritable Rights, by Charters and Sasines.

HAVING treated in the former Chapter, of the Difference betwixt *heritable* and *moveable Rights*, it is now fit to

to begin with *Heritable Rights*, as the more *Noble*. Tit. 3.

2. OUR *heritable Rights* are regulated by the *Feudal Law*, by which, *Feudum*, which we call a *Feu*, was defined to be a *free and gratuitous Right to Lands, made to one for Service to be performed by him*: He who grants this Feu, is in our Law called the *Superior*; and he to whom it was granted, is called the *Vassal*: The Superior's Right to the Fee is called *Dominium directum*, and the *Vassal's Right* is called *Dominium utile*; and if that *Vassal* dispone the Land to be holden of himself, then that other Person, who receives that Feu, is called the *Sub-vassal*; whereas the *Vassal*, who granted the Feu, becomes the immediate *Superior* to this *Sub-vassal*, and the *Vassal's Superior* becomes the *Sub-vassal's* mediate *Superior*, and is so called, because there is another *Superior interjected* betwixt him and the *Sub-vassal*.

Feudum

Superior and Vassal.

Dominium directum & utile.

Sub-vassal.

3. THE *Superior* dispones ordinarily this Feu, to be holden of him by a *Charter* and *Sasine*: The *Charter* is, in effect, the Disposition of the Feu made by the *Superior* to the *Vassal*; and when it is first granted *Charter*, it is called an *Original Charter* or *Right*; and when it is renewed, it is called a *Right by Progress*; and proceeds either upon *Resignation*, when the Lands are resigned in the *Superior's* Hands, for new *Infeftment*, either in favours of the

Vassal himself, or of some *third Party*; or by *Confirmation*, when the *Superior* confirms the Right formerly granted; and if it is to be holden from the Disponer of the *Superior*, that is called *a me*, and is a publick Right, and is still drawn back to the Date of the Right confirmed: But if the *Confirmation* be only of Rights to be holden of the *Vassal*, it is called *de me*, and is a base Right, the Effect of this *Charter* being to secure against *Forfaulture*, or *Recognition* of the *Superior*, all which are voluntar Rights; but if they be granted in Obedience to a Charge upon Apprising or Adjudication, they are necessar.

4. If the *Charter* contains a Clause *De Novodamus*, then it has the Effect of an *Original Right*, and secures against all Casualities due to the *Superior*.

5. In *Charters*, the first thing expressed is, for what Cause it was granted, and if it was granted for Love and Favour, our Law calls that a *Lucrative Cause*, or for a Price and good Deeds; this we call *an onerous Cause*.

Cause onerous and lucrative.

6. The second thing considerable in a *Charter*, is the *dispositive Clause* which contains the Lands that are disponed; and regularly with us, the Charter will give Right to no Lands, but what are contained in this Clause, though they be enumerated in other places of the Charter.

Dispositive Clause.

7. The

7. The third Clause is that, wherein is expreſt the Way how the Lands are to be holden of the *Superior*, and this is called the *Tenendas*, from the firſt Word of the Clauſe. Tenendas.

8. The fourth *Clauſe* is that, which expreſſes what the *Vaſſel* is to pay to the *Superior*, and this Duty is called the *Reddendo*, becauſe the Clauſe whereby it is payable begins, *Reddendo inde annuatim*, Reddendo.

9. The fifth *Clauſe* is the *Clauſe of Warrandice*, which is either Perſonal, or Real; *perſonal Warrandice* is, when the Author or Diſponer is *bound perſonally*, and is either *ſimple Warrandice*, which is only from ſubſequent and future Deeds of the Granter; and this *Warrandice* is implied in pure Donations. Or *Secundo*, *Warrandice* from *Fact* and *Deed*; which is that the *Granter hath not done, or ſhall not do any Deed prejudicial to the Right warranted.* Or *Tertio*, *Warrandice is abſolute*, and that is, *to warrant againſt all Mortals*. And in abſolute *Warrandice*, this is a Rule, that an *adequate onerous Cauſe preſumes firſt abſolute Warrandice*; but *abſolute Warrandice in Aſſignations* imports only, that the *Debt is truly due, and not that the Debitor is ſolvent.* Warrandice Perſonal and Real. Simple Warrandice. Warrandice from Fact and Deed. Abſolute Warrandice

10. All Rights granted by the King are preſumed to be *Donations*, and import no *Warrandice*.

Real Warrandice.

11. Real *Warrandice* is, when *Infeftment of one Tenement is given in Security of another.*

12. The Effect of *Warrandice* is, that if the Thing warranted be taken away, there is *competent to the Party*, to whom the *Warrandice* is granted, an *Action of Eviction.*

13. As *Warandice* infers *Relief*, so *Excambion* infers *Regress*; that is to say, the Party, from whom the *excambed Lands* are evicted, either by a Deed of the *Excamber*, or a Defect of the Right, *has Regress and Recourse to the Lands which he excambed with the Lands which are evicted*: And this arises from the Nature of the *Excambion* without express Paction, and is *competent to, as well as against the singular Successors of Excambers, and their Heirs.*

Precept of Sasine.

14. Because *Tradition* is requisite to the compleating of all Rights; therefore the Charter contains a Command by the *Superior* to his Baillie, to give *actual State and Sasine to the Vassal*, or to his *Attorney*, by *Tradition of Earth and Stone*; and this is called the *Precept of Sasine*, and upon it the Vassal, or some other Person having a *Procuratory* from him, gets from the Baillie *Earth and Stone* delivered in presence of a *Notar* and *two Witnesses*, which *Instrument* is called a *Sasine.* And if the Superior gives Sasine himself,

Sasine.

himself, it is called a *Sasine propriis manibus*; so that a formal Sasine is the *Instrument* of a *Notar*, *bearing the Delivery of Earth and Stone, or some other Symbols by the Superior, or his Baillie to the Vassal*, or his *Attorney*: The Tenor whereof is known and fixed, and now, by a late *Statute, the Witnesses must subscribe the Instrument* *; and thus the *Vassal* stands infeft in the Land by Charter and Sasine (*a*).

Tit. 3. Sasine *propriis manibus*.

* K. C. H. Par. 3. Act. 6. A.

15. THIS Sasine being but the *Assertion of the Notar*, proves not except the Warrand of it, that is to say, the *Precept* or *Disposition* whereon it proceeded, be produced; but a Sasine given by a Husband to his Wife, or by a Superior to his Vassal, *propriis manibus*, (without a *Precept*) is sufficient (*b*), when the *Competition* is with the *Granter's own Heirs*, or with no more *solemn Rights*; and † *when the Lasting Provision* is not exorbitant, and after

(*a*) Not only Feudals, but also Moveables, have, according to their several Kinds, Diversity of Symbols, which Custom hath appropriated to them, and are known by Notaries publick necessarily employ'd in getting Possession, or in taking Sasine.

(*b*) A Sasine *propriis manibus* must be administered, either by a separate Obligation to grant the Infeftment, or by the Husband's, &c. signing before Witnesses the Notaries Instrument.

† I have added these Words, *when the Lasting Provision*.

Book II. Forty Years, there is no Necessity to produce either Precept of Saline, or Procuratory of Resignation by a special Statute †.

† Rid. Vol. Par. 14. Act 214.

16. THIS Saline must be registrated within 60 Days, either in the general *Register* at *Edinburgh*, or in the particular *Register* of the Shire, Stewartry, or Regality where the Land lyes; else the Right will not be valid against a singular Successor; that is to say, if any other Person buy the Land, he will not be obliged to take notice of that Saline, but the Right *unregistred* (t), will still be good against the Granter and his Heirs.

R. Jac. VI. Par. 3. Act 16.

17. IF Lands ly discontigue, every *Tenement* must have a special Saline except they be united in one *Tenement*, and then one Saline serves for all; if there be a special Place expressed, where Saline should be taken; but if there be no Place expressed, then a Saline upon any Part will be sufficient for the whole *Contiguous Tenements*, (these being naturally united; but will not be sufficient for Lands lying discontigue). And one Saline will serve for *Tenements* of one King, but where they are of several Kinds, as Lands, Mills, or holden of different Superiors, or by different Holdings of the same Superior, though *Contiguous*, will require

† I have added these Words, when the Life-rent Provision.

(t) I have added *Unregistred*.

several Sasines? The Symbols of Possession being different, for Lands pass by the *Tradition of Earth and Stone*, and Mills by the *Clap and Happer* (*d*).

Erection in a Barony.

18. SOMETIMES Lands are erected into a Barony, (the Nature of which is explained before, *Tit. inferior Feudes*) and whensoever this is granted, *Union* is implied as the lesser degree (*e*).

19. ERECTION in a Barony can only be by the King, and is not communicable by any Subaltern Rights, albeit the whole Barony be disponed, though the *Union* may be thereby communicated.

20. THIS *Union* can only be granted by the King, which he may grant, either originally, or by Confirmation; and being so granted, it may be transmitted by the Receiver to a Sub-vassal; but if a Part of the Lands united be disponed, the whole Union is not dissolved, but the Part disponed

Division of Tenements.

Ward.

(*d*) The Diversity of Tenements proceeds from their distant Laying, and tho' they be contiguous, yet this Diversity may come from the Holding, when there are several Superiors, or tho' there be but one, if those be different Terms, or different Services in the *Reddendo*. Lands which are reckoned to be *diversa Tenementa*, if they hold of one Superior, may be united by the King, and conveyed down by Substitution, with the Same Name, one Seizen for all.

(*e*) See Book I. Tit. 3. § 11.

poned only; and this Union, and all other Privileges and Provisions can only be granted in the Charter, but not in the Sasine.

21. REAL Rights, being thus established by Charter and Sasine, are not affected or burdened by Backbands, or other personal Declarations; so that singular Successors are not obliged to take notice of them; but till they are so compelated, such Declarations (though personal) do affect them, and are valid against singular Successors: But they affect personal Rights, such as Bonds or Contracts, even though they be not intimated.

TIT. IV.

Of the several Kinds of Holding.

Division of Feus.

THE first *Division* of *Feus*, from the *several Kinds of Holding*, is, that some Lands hold *Ward*, some *Feu*, some *Blench*, and some *Burrage*.

Ward.

2. FOR understanding *Ward-holdings*, it is fit to know, that, at first, all *Feus* were Rights granted by the *Longobards*, and the other *Northern Nations*, (when they conquer'd *Italy*) to their own Soldiers, for Service to be done in the *Wars*; and therefore *Ward-holding*, which is the *proprest Holding*, is called *servitium militare*; and

all

all Lands are therefore presumed to hold Tit. 9
Ward, except another Holding be expres'd; and *servitium debitum & consuetum* is interpreted to be *Ward-holding*.

3. The Advantages arising to the *Superior*, by the *Speciality of this Holding*, are that the *Superior* has thereby the full *Mails* and Duties of the *Ward Lands*, during the Years that his *Male-Vassal* is *Minor* *; for the *Feu* being given originally to the *Vassal* for *Military Service*, it returns to the *Superior* during *Minority*; because the Law presumes, that the *Minor* is not able to serve his *Superior* in the *Wars*; but in *Female Vassals*, this *Casuality* lasts only till 14 *Years compleat*; because they may then *marry Husbands*, who may be able to serve the *Superior*, and this properly is called the *Casuality of Ward*: *For Marriage* is due in other *Holdings*, as shall be cleared in the next *Title*.

* Q. *Mary* Par. 3. Act. 5. K. J. VI. Par. 21 Act 42.

4. Somtimes the *Superior* is content to accept a *liqued Quota*, or *annual Prestation*, in Place of the Mails and Duties, that fell to him by the *Ward*, and this Holding is called *Taxt-ward*: The Marriage is also taxt in that Case to a particular Sum; but, though these Taxt-ward and Taxt-marriage Duties become *debita Fundi*, they being expres'd in the *Reddendo*; yet, because the Holding remains still a *Ward-holding*, therefore Lands holding *Taxt-ward* recognosce, if they be disponed without

out Consent of the Superior. When a *Vassal* holds immediately *Ward* of the *King*, and a *Sub-Vassal* holds *Ward* of that *Vassal*, this is called *Black Ward*, or *Ward* upon *Ward*.

Feu-holding. 5. FEUHOLDING, is that, whereby the *Vassal* is obliged to pay to the Superior a *Sum of Money* yearly, in Name of *Feu-duty*, *Nomine Feudi firmæ (a)*.

Emphyteosis. 6. THIS Holding has some *Resemblance* with the [*Emphyteosis*] in the *Roman Law*, but it is not the same with it; for *Emphyteosis* was a perpetual *Location*, containing a Pension, as the *Hire* which was granted, for *improving* and *cultivating barren Ground*; but our *Feu-holding* comes from the *Feudal Law*, (whereof there is no Vestige in the *Civil Law*) and passes by *Infeftment* to *Heirs*.

Blench-holding. 7. BLENCH-HOLDING is that, whereby the *Vassal* is to pay an *Elusory Duty*, merely for Acknowledgment, as a *Penny* or a *Pair of Gloves*, *Nomine albæ firmæ*, and ordinarily it bears, *si petatur tantum*.

8. THESE *Blench Duties* are not due whether they be of a *yearly Ground*, or not, except they be required *yearly* by the *Superior*; as for Instance, if the *Blench Duty be yearly Attendance at such a Place, or a Rose yearly, the Superior can seek nothing* [illegible] *Vassal may, by Riddendo, be a Feudatory* in part, or in whole.

*K. J. VI. Par. 18. Act 14.

thing for his Blench Duties except he required the same within the Year: But the *Exchequer* now puts a Value upon every *Blench Duty* that can be estimated, such as *Gloves* or *Spurs*, and exacts them for all bygone Years within *Prescription*; though they be not required yearly.

Burgage-holding.

9. BURGAGE-HOLDING is that *Duty* which *Burghs Royal* are obliged to pay to the *King*, by the *Charters*, *erecting them in a Burgh Royal*, and in this the *Burgh* is the *Vassal*, and not the particular *Burgesses*; and the *Bailiffs* of the *Burgh* are the *King's Bailiffs*: Nor can *Sasine* in *Burgage Lands* be given by any other than the *Baillie*, and *Town-Clerk* *, if the *Town* have any, and they must be *registrated* in the *Town Clerk's Books* † (*b*).

* K. J.VI. Par. 1. Act 27.
† K. C.II. Par. 3. Act. 11.

Mortification.

10. WHEN Lands are mortified (which we call *ad manum mortuam*) to Churches, Hospitals, or other pious Uses; the Society to which the Mortification is made, becomes *Vassal*, and the *Reddendo* being only *Præces & Lachrymæ*, and the Society never dying, the Superior loses many Casualities of the Superiority; wherefore Lands cannot be mortified, without the Superior's Consent (*c*).

TIT.

(*b*) See h. t. 3. § 16.

(*c*) That the Revenue of the Crown may not be diminished, the Barons of Exchequer have, since the Union, refused to pass any Signatures of Lands holding of the Crown, in Favours of Societies, Incorporations, or Bodies politick.

TIT. V.

Of the Casualities due to the Superior.

THE *Feu* being thus stated by the *Superior* in the *Person of his Vassal*, it will be fit in the next Place to consider, what Right the *Superior retains*, and what Right the *Vassal acquires* by this *Constitution of the Feu*.

2. THE Superior retains still *dominium directum* in the *Feu*, and the *Vassal* has only *dominium utile*; and therefore, the Superior is still infeft, as well as the *Vassal*; But the *King* needs not be infeft, for he is infeft *Jure Coronæ*, in all the Lands of *Scotland*; that is to say, his being *King is equivalent to an Infeftment*.

3. THE Superior has different Advantages and Rights, according to the different Manner of *Holdings*; and there are some Rights and Casualities common to all *Holdings*.

4. WARD-HOLDING gives the Superior a Right to the Mails and Duties of his *Vassal's Lands*, during all the Years that his *Vassal* is *Minor*; and this is properly called the *Casuality of Ward*; but the Superior or his Donatar are obliged to entertain the *Male Vassal under Minority, and Female Vassal under* 14 *Years*, if he or she has

has no other *Feu* or *Blench Lands*, and to uphold the Houſe, Parks, &c. in as good Condition as they found them; and muſt find Caution for that Effect *. Tit. 3.

* K. J. IV. Act. 25. K. Ja. V. Act. 15.

5. If the *Vaſſal* ſell or diſpone more than the half of his *Ward-lands* to any, except his *apparent Heir*, who is *alioqui ſucceſſurus*, without the Conſent of his Superior, the whole *Ward-lands* fall to the *Superior for ever*; and this we call * *Recognition*, which is introduced to puniſh the Ingratitude of the *Vaſſal*, who ſhould not have *diſponed* the Lands, which is *preſumed he got gratuitouſly from the Superior*, without his own Conſent; and to ſhun this, the *Vaſſal* in *Ward-lands* gets the Superior's *Confirmation*, before he takes *Infeftment*; for, if he take *Infeftment* before he be confirmed, the *Lands recognoſce*, as ſaid is; ſince the Vaſſal ſhows ſufficiently his Ingratitude, by the very taking of the *Infeftment*. But, if the *Saſine* be null in itſelf (c), it infers no *Recognition*; Recognition, * Statuta Rob. 3. cap. 19.

be-

(c) The Nullity our Author points at, muſt reſpect the Eſſentials, and intrinſick Parts of the Inſtrument or Warrant of it, as if the Precept mention not the Name and Deſignation of the Writer and Witneſſes, &c. Or, if the Inſtrument proport not Tradition of the proper Symbols, or be not ſigned by two Witneſſes. For; as the Want of extrinſick Solemnities, as the

not

because, in that Caſe, there is no Right transmitted.

6. And, though the Vaſſal at firſt did not ſell the half, without the Superior's Conſent; yet, if he thereafter ſell as much as will extend to more than the half of the *Feu*, the *firſt Purchaſer* will likewiſe loſe his *Right*, if it was not *confirmed* before he took *Infeftment*. And this holds, even where the Lands are but *wadſet*, though the *Back-Tack-Duty* does not extend to the equal half of the Value of the Lands, if the Lands *wadſet* exceed the major Part of the Tenement: But *Alienation* of Teinds infers not this *Caſuality*; becauſe Tithes are not *holden ward*.

7. Not only a *Confirmation* or *Novodamus*, if it expreſs *Recognition*; but the Superior accepting Service, or purſuing for the *Caſualities*, or accepting Right from the Vaſſal poſterior to the Deeds inferring *Recognition*, are a paſſing from the *Recognition*, becauſe they infer the Superior's Acknowledgment of the Vaſſal's Right. And *Inhibition* raiſed and executed before the *Recognition* be incurred, ſecures againſt the ſame by a late *Statute* * (*d*).

Novodamus.

*K. J. VII. Par. 1. Act 4.

8. Recog-

not Regiſtration of the Inſtrument of Saſine, within Sixty Days, does not wholly annul, for it will be of ſome Effect; as is ſaid in h. t. 3. § 16. So, in like Manner, it will operate Recognition.

(*d*) Not only the Superior's granting Right to his Vaſſal; but alſo his accepting from him a real

8. RECOGNITION takes Place in *Taxt-ward*, as well as *Simple-ward*, but in no other Manner of Holding, except the ſame be expreſly provided in the Vaſſal's Charter: For *Ward-holding* is preſumed to be the only proper *Feudal Right*. Tit. 5. § 2.

9. IF the Vaſſal denieth the Superior, he loſes his *Feu*, and this is called *Diſclamation* *; but any probable Ground of *Ignorance* will take off this *Forfeiture*. Diſclamation. * Statuta Rob. 3. cap. 18. Reg. Majeſt. lib. 2. cap. 63. Par. 6. Act 9.

10. IF the Vaſſal, who holds *Ward-lands* dies, having an *Heir unmarried*, whether *Minor*, or *Major*, the Superior gets the Value of his *Tocher*, though he offer him not a *Woman* to be his *Wife*; but, if the Superior offer him his *Equal* for a *Wife*, and he refuſes to accept her, and marries any other Perſon; the Superior gets the Double of his *Tocher*, and one of theſe *Caſualities* is called the *ſingle Avail of the Marriage*, and the other the *double Avail of the Marriage*; but the *Modification* of this is referred to the *Lords of Seſſion*, who conſider ſtill what was the Vaſſal's *free Rent*, all Debts deduced, and the ordinary *Modification of the ſingle Avail* is about two *Years Rent* of the Vaſſal's *Eſtate*, even though the *Heir* was *Heretrix*; and the *double Avail* is but a Year more, Avail of the Marriage. The *ſingle* and *double* Avail of the Marriage.

real Right on the Land, takes off the Effect of Recognition, provided theſe Rights be poſterior to the Deeds inferring Recognition; and upon the Superior's Part be voluntary, *i. e.* not in obedience to a Charge of Horning.

which is three *Years free Rent*: And though there were more *Heirs Portioners*, there will only one *Avail be due for them all.*

11. THOUGH this *Casuality* of *Marriage* be still due in all *Ward-holdings*, yet they may be due by *express Paction* in other *Holdings*; and there are many in *Scotland*, who hold their *Lands Feu, cum maritagio*; and in both Cases, the Marriage is *debitum Fundi.*

12. THOUGH, as to the *Casuality* of *Ward*, every Superior has Right to the *Ward-lands holding* of himself, where the Vassal holds *Ward-lands* of moe Superiors; yet the *Casuality* of Marriage falls only to the *eldest* Superior, because there cannot be more Tochers than one, and he is the eldest Superior, from whom the Vassal had the first *Feu*; but the *King* is still presumed to be the eldest Superior, because all *Feus* originally flowed from him.

13. IT is thought, that the Reason why this *Casuality* is *due*, was, because it was not just that the Vassal should bring in a Stranger to be *Mistress of the Feu*, without the *Superior's Consent*; for else, he might choise a *Wife* out of a Family that were an Enemy to the *Superior*; but I rather think that both *Ward* and *Marriage* proceeded from an *express Paction* betwixt King *Malcom Kenmore* and his Subjects, when he first *feued* out the whole *Lands* of *Scotland*

Scotland, amongſt them; as is to be ſeen in the firſt of his *Statutes* *. Tit. 5.

14. The ſpecial Duty ariſing to the Superior in a *Feu-holding* is, that the Superior gets a *yearly Feu-duty* paid to him; and, if no Part of this *Feu-duty* be paid for *two* Years, then the Vaſſal loſes his *Feu ob non ſolutum Canonem*; for the *Feu-duty* is called *Canon*; and, if this Proviſion be expreſs'd in his *Charter*, he will not be allowed to purge this *Irritancy*, by offering the Bygones at the *Bar*; but, though this *Proviſion* be not expreſs'd in the *Charter*, yet the *Feu* will be annulled for not Payment of the *Feu-duty*, by an expreſs Act of Parliament †; but the Vaſſal, in that Caſe, will be allowed to purge at the *Bar*; and the Reaſon of this Difference is, becauſe the *expreſs Paction* is thought a ſtronger Tie than the *mere Statute* (e).

* Leg. Milcol. cap. 1. Feu-duty.

† K. J. VI. Par. 15. Act 246.

15. A *Clauſe irritant*, in *our Law*, ſignifies any *Proviſion*, which makes a *Penalty* to be incurred, and the *Obligation* to be null for the future; as, where the Superior gives out his *Feu* upon *expreſs Condition*, that, if the *Feu-duty* be not paid, the *Feu* ſhall be *null* and *reducible*, and a *Clauſe reſolutive* is a *Proviſion*, whereby the *Contract* to which it is affixed, is for not *Performance*, declared to have been *null* from the Beginning. Clauſe irritant. Clauſe reſolutive.

(e) I have changed *three*, to *two* Years, conform to Act 246. Parl. 1597. which ſee, and our Author's Obſervation on it.

16. THE *Caſualities* that are due by all Manner of *Holdings*, and which ariſe from the very *Nature of the Feu*, without any *expreſs Paction*, are *Nonentry*, *Relief*, and *Liferent Eſcheat*.

Nonentry. 17. NONENTRY is a *Caſuality*, whereby the *Superior* has Right to the Mails and Duties of the Lands, when there is not a *Vaſſal* actually entered to the Lands, or, where the *Vaſſal's* Right is reduced after he is entered; and the Reaſon why this is due to him, is, becauſe he having given out his *Feu* to his *Vaſſal* for Service, when there is no *Vaſſal* entered, the Law allows him to have Recourſe to his own *Feu*, that he may therewith provide himſelf a Vaſſal, who may ſerve him: But, though the full Rents of the Lands be due to the *Superior*, from the very Time that he cites his Vaſſal, to *hear* and *ſee* it found and declared, that the Lands are in *Nonentry*; yet, before that *Citation*, the *Superior* gets only the *retoured Duties*; and the Reaſon of the Difference is, becauſe, after *Citation*, there is a greater Contempt than before, and ſo is to be more ſeverely puniſhed.

Retour'd Duty. 18. FOR underſtanding which *retoured Duty*, it is fit to know, that there was, of old, a *general Valuation* of all the *Lands* of *Scotland*, but thereafter, there was a *new Valuation*, the firſt whereof is called *the old*, and the ſecond *the new Extent*, and both are called the *retour'd Duty*, becauſe they

they are expreſs'd in the *Retour* (or *Return*) that is made to the *Chancellary*, when an *Heir is ſerved*; but both are very far below the *Value* to which Lands are now improved, though, in *our Law*, the *new Extent* be conſtructed to be the Value: But, if the Lands be not retoured, the Donatar to the *Nonentry* will have Right to the full Mails and Duties, even before Citation: The *old Extent* is ſaid to be made *tempore pacis*, and the *new Extent tempore belli*; and the moſt probable Reaſon of theſe *Terms* is, that the firſt *Valuation* was very mean, being made in Time of Peace; But our *Kings* being engaged thereafter in War with the *Engliſh*, there was a new Valuation made much greater than the firſt, to augment the *Revenue* for Maintenance of the *War*: And therefore, the new Extent or Valuation is ſaid to be made *tempore belli*.

19. But in an *Infeftment of Annualrent*, the whole *Annualrent* is due, as well before *Declarator*, as after; becauſe the whole *Annualrent* is the *retoured Duty*, it being *retoured*, *valere ſeipſum*; and that is called *an Infeftment of Annualrent*, when the *Vaſſal* is not infeft in the *Property* of the particular *Lands*; but is *infeft* in an *yearly Annuity of Money*, to be paid out of the *Lands*; as for Inſtance, if a Man ſhould be infeft in the Sum of *Five hundred Merks yearly*, to be payable out of any particular *Lands*, Infeftment of Annualrent.

being worth 500 Merks yearly, how ſoon the *Vaſſal*, who had Right to the 500 Merks died, the *Superior* would have Right to the whole *Annualrent* yearly, until the Heir of the Vaſſal be entered. *Vide infra Tit, Redeemable Rights, § Annualrents* (f).

20. THERE is no *Nonentry* due in *Burgage Lands*; becauſe the *Burgh* it ſelf is Vaſſal, and never dies; and ſo therefore neither does the *Burgh* nor any private *Burgeſs* pay *Nonentry*, the Duty payable by the *Burgeſſes*, being only *Watching* and *Warding*: And yet their *ſingle Eſcheats* fall to the *King*. The *Nonentry* ſubſequent to the *Ward*, is of the *Nature* of the *Ward*; and, if the *Superior* or *Donatar* were in Poſſeſſion, they have Right to the full *Mails* and *Duties*, without any *Declarator*; but in that Caſe, the *Donatar's Right* extends only to three *Terms ſubſequent* to the *Ward*, after which there is Place to a *ſecond Donatar* (g).

21. WHEN

(f) This is alter'd. And by *Act* 40. *P. July* 1690 it is ſtatuted, *That in Time coming, Annualrents ſhall be retour'd only to the Blench Duty, or other Duty contain'd in the Bond, & Inſeſtment of Annualrent; and that no ſpecial Declarator ſhall, until Citation in the general Declarator, be ſuſtained further than for theſe Duties.*

See h. t. 8 § 15.

(g) I have taken out the Words *Liferent, as well as*, in the former Editions, being diſagreeable to Law, and to what is ſet down in § 35. h. ſeems to have crept in by Miſtake.

21. When the Vassal enters, he pays Tit. 5.
an Acknowledgment to the Superior, which is called *Relief*; because 'tis paid for relieving his *Land* out of the Superior's *Hands*. It is *debitum fundi*, and effects not only the *Ground really*, but the Vassal *personally*, who takes out the Precept for infefting himself; though he never takes *Infeftment* thereupon. Relief.

22. The Value of this *Casuality* varies, according to the Nature of the Holding; for in *Blench* and *Feu-holdings*, it is only the Double of the *Feu* or *Blench-duties*; but in *Ward-holdings*, it is the full Duty of the Land, if the Superior be in Possession the Time of the Vassal's *Entry*; but, if the Superior was not in *Possession*, even though the Vassal was *Minor*, then the Superior gets only the *retoured* Duty; and it is so far from being presumed, to be *remitted* by the *Superior's* entring his Vassal, that it is still exacted by the *Exchequer*, though it be gifred with the other *Casualities*.

23. For understanding *Liferent Escheats*, it is fit to know, that when any Man does not pay a *Debt*, or perform a *Deed* conform to his *Obligation*, his *Obligation* is *registrated*; if it carry a *Consent* to the *Registration* in the Body of it, or, if it do not, there must be a *Sentence recovered*, and upon that *registrated Writ* or *Decreet* (for a *registrated Writ* is a *Decreet* in the Liferent Escheat.

Construction of Law) there will be *Letters of Horning* raised, and the *Party* will be charged; and, if he pay not within the Days allowed by the *Charge*, he will be *denounced Rebel*, and put to the *Horn*, and from the very Date of the *Denunciation*, all his *Moveables fall to the King by a Casuality*, which is called *single Escheat*; but now single *Escheats* fall likewise to *Lords of Regalities*, if the Persons *denounced* live within a *Regality*; because the *King* uses to gift all single *Escheats* at the Erection: But, if they be not expresly gifted, they remain with the *King*.

Single Escheat.

24. UNDER the single *Escheat* fall all Sums that are moveable *quoad Fiscum*, and all bygone Annualrents, even of heritable Sums, and the bygone Rents of the Lands, together with the Crop that is upon the Ground the Time of the *Rebellion* (*b*), and the Mails and Duties due at the Term, immediately subsequent to the *Rebellion*.

25. IF the Vassal continue Year and Day *Rebel*, without *relaxing* himself, (which *Relaxation* is expeded by *Letters* under the *King's Signet*, expresly ordaining him to be *relaxed from the Rebellion*) then he is esteemed as *civilly dead*; and consequently not being able to serve the *Superior*, the Law gives the *Superior* the *Mails* and *Duties* of his *Feu*, during all the Days of the Vassal's Life;

Relaxation.

(*b*) Add, yea, till Year and Day after Rebellion, unless the Rents of Lands fall to a Superior by Liferent Escheat. See § 28. h.

Life; and this *Caſuality* is called *Liferent Eſcheat*: So that every *Superior*, as well as the *King*, has Right to the Mails and Duties of the Lands holden of himſelf*, if his Vaſſal was once infeft, and even though he was not infeft, if he was *appear and Heir*, and might have been infeft, for his lying out ſhould not prejudge his *Superior*; but, if a Man have Right by Diſpoſition, whereupon no Infeftment followed, the *King* only will have Right to his *Liferent Eſcheat*, ſince the *ſingular Succeſſor* not being yet infeft by the *Superior*, of whom he is to hold his Lands, that *Superior* cannot have Right, and *conſequently* their *Liferent* falls to the *King*; and the *Liferent* of Miniſters, in ſo far as concerns their *Manſes* and *Glebes*, falls alſo to the *King*; becauſe they require no Infeftment, and are not holden of any other *Superior*: But all *heritable* and *Liferent Rights* requiring no Infeftment of their own Nature, ſuch as a *Terce* and *Liferent-Tacks*, fall not to the *King*, for *Liferent-Tacks* fall to the *Maſter of the Ground* and the *Liferent* by *Terce* pertains to the *Superior*, during the *Liferenter's* Lifetime*(k).

Tit. 5.

*K. Ja. V. Act 32.

*K. J. VI. Parl. 22. Act 15.

26. THIS

(k) So ſoon as a *ſingular Succeſſor* is infeft, the Superior is intitled to Caſualities; and in Conſequence thereof, hath Right to the Liferent Eſcheat of his Vaſſal Rebel, at the Time of Entry, unleſs the Charter have a *Novodamus* ingroſſed in it.

26. This *Liferent Escheat* comprehends only *Rights*, to which the Vassal himself had Right for his *Lifetime*, for else, it will fall under *single Escheat*, (*single Escheats* comprehending every Thing that is not a *Liferent Escheat*) and therefore, if the *Superior* having Right to the *Vassal's Liferent Escheat*, become *Rebel* himself, the *Vassal's Liferent Escheat* will fall under the *Superior's single Escheat*, for the *Superior* had not Right to those *Mails* and *Duties*, during all the Days of his own *Lifetime*; and so it could not fall under his *Liferent*: And the like does, for the same Reason hold in all such, as have Assignations to *Liferents* or to *Liferent Escheats*, or to *Tacks* for any definite Number of Years, few or many.

27. The *Superior* has also Right to the *Sub-vassal's Liferent Escheat*, which falls after the Vassal's *Denunciation*; for, by the *Denunciation of the immediate Vassal*, the *Superior* comes in his Place, and so has Right to the *Sub-vassal's Liferent*: But, if the *Sub-vassal* be first *denounced*, his *Liferent* falls under the Vassal's *single Escheat*.

28. The *Liferent Escheat*, falls by the *Rebellion*, that is to say, by the *Denunciation*; and the Year and Day is given only to the *Rebel* to *relax himself*; so that, if he *relax* not within that Time, his *Liferent will fall from the Denunciation*.

29. In

29. In Competitions betwixt the *Superior* or the *Donatar*, and the *Rebel's Creditors*, these Rules are observed in our Decisions: *First*, As to *single Escheats*, (which must be treated here for their Contingency, with *Liferent Escheats*, though *single Escheats* fall not to the *King*, as *Superior*, but as *King*.)

30. No *legal Diligences*, nor voluntar Rights, for Payment of any Debt contracted after *Rebellion*, will prejudge the *King* or his *Donatar*; since otherwise a *Rebel* at the *Horn* might fraudulently contract Debt to evacuate the *Escheat*.

31. 2*do*, If a lawful *Creditor*, for a *Debt prior* to the *Rebellion*, compleat his Diligence, before *Declarator*, he will be preferred to the *Donatar*.

32. 3*tio*, No *voluntar Assignation*, (though for a *Debt prior* to the *Rebellion*) if granted after *Rebellion*, and compleated by Intimation before *Declarator*, will be preferred to the *Donatar*; but actual Payment will be preferred, if the Debt was *prior* to the *Rebellion*, and the Payment obtained before *Declarator* (*m*). As to *Liferent Escheats*, the Rules in Competitions run thus.

33. Primo, Though the Debt was prior to the Denunciation, no voluntar Infeftment

(*m*) Delivery of Goods for Security, or in Satisfaction, is the same with actual Payment.

feitment will prejudge the Superior; except the Rebel was obliged prior to the Rebellion, to grant that Infeftment, and that the Infeftment it self was expede within Year and Day of the Denunciation.

34. SECUNDO, Though legal Diligence be more favourable than voluntar Rights, becauſe there is leſs Colluſion, yet no legal Diligence will be preferred to the *Superior*, except it was led for a *Debt prior to the Denunciation*, and was compleated by *Infeftment* or *Charge*, or that a Signature was preſented to the Exchequer (which in Lands holding of the King, is equivalent to a Charge, ſince the King cannot be charged) within Year and Day thereof; albeit the ſaid legal Diligence was deduced after the *Denunciation*.

35. THOUGH this be the Courſe in Competitions, *quoad* Liferent Eſcheats; yet actual Payment made to, or Diligences done by Creditors for Payment of *Debts*, prior to the Rebellion, or the Commiſſion of Crimes, will be preferred to the *Donatar*; if theſe Rights or Diligences be compleated before *Declarator*, which we owe rather to the Benignity of our Kings, than to the Nature of theſe *Rights*, ſince there is *jus quæſitum Fiſco*, by the *Denunciation*.

36. LIFERENT Eſcheats are proper to all kinds of Holding, except Burgage and Mortl-

Mortification; for the Vaſſal being a *Society* or *Incorporation*, dies not, and ſo can have no *Liferent Eſcheat*; and albeit the *Adminiſtrators* were denounced for *Debts* due by the *Incorporation*, yet that is ſtill preſumed to be their Negligence, which ought not to prejudge the Society. Tit. 5.

37. For compleating this Caſuality, a general *Declarator* muſt be raiſed at the Superior or Donatar's inſtance, to hear and ſee it found and declared, that the Vaſſal was orderly denounced Rebel, and has continued at the Horn Year and Day: And in Competitions betwixt *Donatars*, the laſt Gift, if firſt declared, will be preferred.

38. If the Gift be taken to the behoof of the Rebel, it is null; and it is preſum'd to be to his Behoof, if he or his Family be ſuffered to ſtay in Poſſeſſion; or if the Gift be procured by the Rebel's Means.

39. It is obſervable in Temporary Caſualities, ſuch as Ward, Nonentry, and in all *Conſolidations* of the *Property* with the *Superiority*, ſuch as *Recognitions*, *Baſtardies*, *Ultimus Hæres* (*n*), the Feu returns to the

(*n*) The King ſucceeding as *Ultimus hæres*, or to Baſtards, or his Donataries, are obliged to pay *Secundum vires hereditatis* the whole Debts either real or perſonal, due by the Defunct; but neither Teree, nor Courteſy affect Lands recognoſced, becauſe of *Differences* between Feudal Deliets, and Feudal Rights.

Book II. the Superior, burdened with all real *Rights*, to which he has conſented by Confirmation, or otherwiſe: And with all theſe Rights which the Law hath eſtabliſhed, without either Paction or Party, or Conſent of Superior, ſuch as *Terce* and *Courteſy*; and therefore ſuch Rights do in both Caſes defend againſt the Superior: But when the Lands return to the King by Forfaulture(o), His Majeſty is not obliged to acknowledge either *Terce* or *Courteſy*, or any other Right but what himſelf hath actually confirmed; and both the King and other Superiors have no more Right by Liferent Eſcheat than the Vaſſal himſelf had formerly, ſince they come only in the *Vaſſal*'s Place, who by his Rebellion is rendered incapable to ſerve the Superior.

40. When theſe Caſualities are gifted by the King, the Writ by which they are tranſmitted, is called a *Signature*, (as all other Writs are which paſs his Majeſty's Hand) and they are ſo called, becauſe they are ſigned by him: And they muſt be written by Writers to the Signet, and paſs the Signet.

41. If theſe Signatures contain only *Temporary Caſualities*, ſuch as Gifts of *Ward*,

(o) The Law with Reſpect to Forfaultures, is mitigated, by *Act* 33. *Par. July* 1690, whereby it is declared, *That no Forfaulture ſhall prejudge the Tacksmen, Creditors, Superiors, Vaſſals, Heirs of Entail, Husbands, or Wives of the Perſon forfeited.* See the Act.

Ward, Marriage, Eſcheat, &c. or only a Right to Moveables, they paſs only the *Privy Seal*; for what Right Subjects tranſmit by Aſſignations, his Majeſty tranſmits by the *Privy Seal*. But if the Right require a *formal Diſpoſition*, and to be compleated by Inſeſtment, it muſt be tranſmitted under the *Great Seal*, and the *Signatures* ought to expreſs under what Seals they ſhould paſs. All great Offices and Commiſſions to *Judicatures* ſhould likewiſe paſs the *Great Seal*; except it be otherwiſe provided by Law, as Commiſſions of *Juſticiary*, which by Act of *Parliament* are allowed only to paſs the *Quarter Seal*. Tit. 34

42. THIS *Quarter Seal* was originally invented for ſealing *Writs*, which firſt paſſed the *Great Seal*, as Precepts of *Saſine upon Charters* paſt the *Great Seal*. And is therefore called the *Teſtimonial* of the *Great Seal*, and the Shape of it is the fourth Part of the *Great Seal*. The *Great Seal* contains virtually the *Privy Seal*; and therefore, though when a Man is forfeited, the Right of his Moveables ſhould be tranſmitted by a Right under the *Privy Seal*, and the Right of his Lands under the *Great Seal*; yet the Lords have found (*q*), that the Right of the Moveables may be tran-

(*q*) For Illuſtration of Sections 40, 41, 42. See *Hope's Minor Practicks*, Tit. viii.

Book II. tranſmitted in the ſame *Signature* with the Lands, if the Moveables be therein expreſly diſponed and aſſigned.

43. These Seals were invented to be Checks upon ſuch as obtain'd Gifts from the King by *Subreption* or *Obreption*; that is to ſay, by concealing what is True, or expreſſing what is Falſe: For even after the *Signature* is paſs'd the King's Hands, it may be ſtop in theſe Caſes.

44. The laſt Privilege of the Superior is, that he may *force his Vaſſal to exhibit his Evidents*, to the End he may know what is the *Nature of the Holding*, and in what he is *liable to him as his Superior*, which proceeds ordinarily by an *Action of Improbation*; whereby he will be forced to exhibit, and produce his Evidents, to ſhun the Hazard of the *Certification* in the *Improbation* (p).

TIT.

(p) In ancient Times, the Superior raiſed Action of Exhibition of Charters, Infeftments, &c. againſt the Vaſſal, that he might know the Tenor of the Feu. Of late, the Superiors begin to keep a Chartulary, but that not being Title of Action againſt Vaſſals for paying their Duties, I have known Bond taken, narrating the Tenor of the Charter, and concluding in an expreſs Obligation to perform the *Reddendo*. See *Spotiſwood*'s Introduction to Styles. Page. 131. Our Author in his Obſervations on *Act* 9. *Parl.* 1424, tells the ſeveral Ways patent to a Superior for getting ſight of his Vaſſal's Charter.

TIT. VI.

Of the Right which the Vassal acquires by getting the Feu.

THE *Vassal*, by getting the *Feu* settled in his Person by *Charter and Sasine*, as said is, has Right to all Houses, Castles, Towers, (but not Fortalices) (*a*) Woods, and other Things that are above Ground of the Lands expressly disponed; and to Coals, Lime-stone, and other Things within Ground; and to whatever has been possessed as Part and Pertinent of the Lands *past Memory of Man*: But there

(*a*) See *Craig De Feudis*, either in *Latin*, or the *English* Abridgment of it, *Lib.* 2. *Dig.* 8. A Fortalice, or *Turris pinnata*, so called, from *Pinna* a Pin, a sharp pointed Pale, set about a Tower, on the side of a Bartisan, or about the Fossee or Ditch, for Defence of the Place: This Paleing, with other inward Accommodations for warlike Use, shew the original Design was to have it made a Fortress: These Fortalices have, in proper Places of the Kingdom, fortified by Art or Nature, been built, either by the King himself, or by his Barons having his Warrant. They are of an higher Kind than either Towers or Castles, which are chiefly made for Lodging, and, upon Occasion, may serve for Defence. All these Houses are *inter Regalia communicabilia*, resumable by the King, when needful. *Skeen* says, Fortalice is a Castle, or properly an House, or Tower, having a Battlement, a Barmekin or Fousie about it.

Book II. are some Things which pass not under the general dispositive Words, and require a special Disposition, which belong to the King in an eminent Way, and are called therefore *Regalia*(b), and are not presum'd to

Regalia.

(b) The Word *Regalia* signifies in general, these Things, Rights, and Prerogatives competent to the King or Sovereign Prince, as such, and which cannot be claim'd by a Subject as belonging to his private Right. These things have been given to a Sovereign, to shew forth the Honour of his Royal Dignity, and to enable him to defray the Expence necessary in the Exercise of his Kingly Office. The *Regalia* are divided into *Majora*, or Larger, and *Minora* or Lesser. The greater are said to be incommunicable, such as, the Royal Badges of Honour, the Crown, the Scepter, &c. As also, his Prerogative Royal, whereof some are set down in *Book* I. *Tit.* 3. § 1. The lesser or communicable *Regalia*, are the feuing of Lands not annexed to the Crown, and the communicating to well deserving Subjects the Emoluments and Casualities falling from Time to Time to him as King, or as Superior of Lands possest by the Subjects. For further Knowledge of this Matter, see *Feud. Leg.* 11. *C.* 56. *Qua sunt Regalia. Craig. Feud. Lib.* 1. *Dig.* 16. § 30. 31. *Pag.* 120, 121. Mines and Minerals are in the Feudal Law called *Argentaria*, see *Craig* in the above *Dig.* § 24. *Pag.* 118. And for illustrating this Matter, read the Act cited in the Margine, with our Author's Observations on it. Our Law, it seems, gives to the King all Mines, when, out of the Pound of the Metal, three half pennies of Silver can be fund: And for understanding this Way of speaking, common to all Metallists, and

to have been disponed by his Majesty, or any other Superior; except they were specially mentioned; such as are all Jurisdictions, Forests, Salmond-fishings, Treasures hid within the Ground, and Gold, Silver, and fine Lead; for other Mines, such as Iron, Copper, *&c.* belong to the Vassal *. Tit. 6.

* K. J. I. Act. 12.

2. If Lands be erected in a Barony by the King, then, though the Lands ly discontiguously, one Sasine will serve for them all; because a Barony implies an Union.

3. This erecting them in a Barony will likewise carry a Right to *Jurisdictions*, and *Courts*, *Fortalices*, *Forests*, hunting of *Deer*, and *Ports*, with their small Customs granted by the King, for upholding these *Ports*, *Mills*, *Salmond-fishings*, &c. because *Baronia est nomen universitatis* (*c*), and

to have a Rule for judging the Fineness of Gold or Silver, see the same *Dig.* in *Craig.* § 19, 20. *Pag.* 116. And tho' these Mines belong to the Prince, yet they may be gifted, as they are frequently disposed upon, but will not fall under a general Clause.

(*c*) *Craig, Feud. Lib.* 1. *Dig.* 8. § 3. *P.* 185, says, That these Feudal Words, Lordship, Earldom, and Barony, have Jurisdiction and Dignity annexed to them, and that *Baronia est nomen universitatis sive jurisdictionis*, which, being generally expresst, (one may think) comprehends Criminal, as well as Civil Justice. But whatever Things may be

granted

Book II. Possession of any Part of a Barony is reputed Possession of the whole: But Mines of Gold and Silver †, Treasures, and Goods confiscated, are not carried with the Barony.

†K. J. I. Ac. 12.

4. The Heritor has also Power to set Tacks, remove and put in Tenants, as a Consequence of his Property.

Tack. 5. A *Tack is a Location or Contract, whereby the Use of any Thing is set to the Tacksman for a certain Hire*; and in our Law it requires necessarily, that the Terms of the Entry, and the Ish, must be express'd, that is to say, when it should begin and end, and it must bear a particular Duty, else it is null; and if it be a valid Tack, that

granted by the Word *Barony*, yet nevertheless, the King is supposed to reserve tacitly to himself the Exercise of the Jurisdiction within a Barony, when the Good of the State requires it; and likewise, when he comes within the Barony, a Faculty to hunt in the Forests, and to catch Deer, &c.

The Writer of the Remarks subjoin'd to the former Editions of this Book saith, That the erecting Lands in a Barony, carries not Right to Capital Jurisdiction; it would have been desireable that he had given a Reason for such a Position. For these Words *Pit* and *Gallows*, which import *Criminal Jurisdiction*, and others specified in the *Habendas* of Charters, are, as Craig says in his Treatise of *Feus*, *Lib.* 1. *Dig.* 2. § 24. *Pag.* 150, 151. insert more for Explanation, and out of Caution, than out of Necessity.

that is to ſay, if Writ be adhibited, (verbal Tacks being only valid for one Year) and the Thing ſet, the *Contractors Names*, *Tack-duty*, *Iſſ* and *Entry*, clearly therein expreſs'd, and clothed with Poſſeſſion, it will defend the poor Tackſman againſt any Buyer *; which was *introduced in favours of poor Tenants* for encouraging them to improve the Land (*d*): But it will not defend againſt *a Superior of Ward-lands*, *for the Ward*, &c. though by Act of Parliament the Superior be obliged to continue them in their Poſſeſſion till the next Term of *Whitſunday* †. Tit. 6.

*K. J. II. Act 17.

†K. J. IV. Act 26.

6. ALBEIT Tacks have not all the *Solemnities* aforeſaid; yet they are valid againſt the Granter, and his Heirs.

7. TENANTS cannot aſſign their Tacks, except they be *Liferent Tacks*, or that the Tack bear a Power to aſſign; but they may be compriſed or adjudged; And if the Maſter ſuffer the Tackſman to continue after the Tack is expired, he will be obliged to pay no more than he paid formerly during the Tack; and this is called, in our Law, the benefit of a *tacit* Relocation. Tacit Relocation.

 Relo-

(*d*) The Tenant, who is before the Iſſ of his Tack removed by a Superior, or his Donatary of the Proprietaries Ward or Non-entry, returns to the Poſſeſſion of the Tenement at the Term after the Vaſſal's Majority, or after the Lands are full, and continues to poſſeſs the compleat time in his Tack.

Relocation, that is to say, both the *Setter* and the *Tacksman* are presumed to design to continue the Tack upon the former Terms, till the Tenant be warned.

8. If the Tack be granted to *Sub-Tenants* (*e*), then the *Tacksman* may set a *Sub-tack*, which will be as valid as the *principal Tack*, if clothed with Possession.

Rentals. 9. Rentals are also a kind of *Tacks*, (*f*) but more favourable and easy, because the *Rentaler* and his Predecessors have been *ancient*

(*e*) Read the first Line thus,
If the Tack be granted to one, his Heirs, or Sub-Tenants.

(*f*) A Tack, in which the Time of Endurance is not expressed, is *ipso jure* null, *i. e.* it will not produce Action against the Landlord for giving to the Tacksman Possession of the Tenement; but if the Tenant attain Possession, the Law gives to such Tacks the Effect of an Annual one. It is other ways in a Rental, for when no Time is mentioned, anciently the Rental, if Church Lands, was presum'd to have been given during Life, and of other Lands it was interpreted to be for one Year. *Craig de feud. Lib.* 11. *Dig.* 9. § 26. But he adds, whereas, it seems, a Rental hath in it Something more than a Tack, the Lords of Session made this Mitigation, that a Rental indefinite as to Time, should be esteem'd, as if given for five Years, when, in former Times, several of our Lawyers judg'd such a Rental of Lands lying within a Barony, lasted no longer than one Year; others again drew it out to the Lifetime of the Rentaler; which last, seems to be the Rule of present Practick. See *Stair's Instit. Lib.* 11. *Tit.* 9. § 19.

ancient Poſſeſſors, and *kindly Tenants*; and he pays a *Graſſum* or Acknowledgment at his Entry, and yet they laſt no longer than for a Year, if there be no Time expreſſed; and if they be granted to a Man and his Heirs, they laſt only to the firſt Heir; for elſe they behoved *for ever to belong to the Heirs*, and ſo would want an *Iſſ*; but no Tack is accounted a *Rental*, except it be in Writ, and the Writ bear the ſame. Tit. 6.

10. RENTALS cannot be aſſigned, except that Power be granted in the *Rental*; and if the *Rentaler* aſſign, he loſes his *Rental*; though a *Tackſman* forfeits not his Right by aſſigning it, the *Aſſignation* being only null.

11. WHEN the Years of the Tack expire; or though their be no Tack, yet the Maſter cannot *ſummarily remove his Tenant or Poſſeſſor, except from liferented Lands*, (g) *and Houſes, or Towers, and Fortalices*, Removing ſolemn and ſummar.

(g) The Landlord cannot ſummarily remove the Poſſeſſor except from Houſes or Lands liferented and poſſeſſed without a written Tack, or from Towers and Fortalices, even tho' ſet in Tack. See *Craig Lib.* 11. *Dig.* 9. § 18, 19. *Pag.* 199. When he hath Uſe for them, or when the Defence of the Country requires, in which Caſe, the Tenant muſt be provided with a fit Houſe elſewhere. Vicious or precarious Poſſeſſors, *i.e.* who poſſeſs by an unſufficient Right, or by Tolerance, may be remov'd ſummarily. Beſides theſe, there's a

and vicious Poſſeſſors, whom he can remove by a Summons on ſix Days; but, in all other Caſes, he muſt warn him Forty Days before the Term of *Whitſunday*, though the Term at which he were to remove by Paction, were *Martinmas* or *Candlemas*; which warning muſt be executed, that is to ſay, *intimated perſonally to the Tenant*, and upon the *Ground of the Lands*, and at the *Pariſh Kirk* immediately after Sermon; in both which Places, Copies of the Warning are to be left: And if he then refuſes, he muſt be purſued to remove *upon ſix Days*: And after this Citation, the Maſter will get againſt him *violent Profits*; that is to ſay, The *double of the avail of the Tenement within Burgh*, and the higheſt Advantages that the *Heritor* could have

a Removing, called *Extraordinary*, by a Summons raiſed at the Inſtance of a Landlord againſt the Tackſman, for declaring the Tack void, through his ſuffering two Years Tack-duty to be unpaid, and for decerning him to pay bygone Rent, and to find Caution for Payment of what ſhall be due in Time coming, or otherwiſe to remove ſummarily. This Action is analogous to that at the Inſtance of a Superior againſt a Feu Vaſſal. See *Lib.* 11. *Tit.* 5. § 14. and *Mackenzie*'s Obſervations on the Act cited at the End.

In this Caſe, there's no Warning previouſly requiſite, as in the above ſummar Removings, and the Lords of Seſſion are the ſole Judges competent. See Preſident *Falconer*'s Deciſions, Numb. xiii.

have got if the Tenant poſſeſſed Lands in the Country; nor will the Tenant be allowed to defend againſt this removing, till he find *Caution* to pay the *violent Profits* *. Tit. 6. *Q. Mar. Act 39.

12. THE Maſter has likewiſe a *tacit Hypothick in the Fruits of the Ground* (*b*), which he ſets to his Tenant, in ſo far as concerns a Year's Duty; that is to ſay, they are *impignorated by the Law* for that Year's Duty, and he will be preferred either to a Creditor who has done Diligence, or to a Stranger who has bought them; though in a publick Market: And the Lands-lord, within Burgh, has a *tacit Hypothick* in all the Goods brought into his Houſe by his Tenant, which he may retain, *ay and while he be paid of his Year's Rent*; which *tacit Hypothick* the *Superior* has alſo for his *Feu-duty*. Tacit Hypothick.

TIT.

(*b*) The tacit Hypothick in rural Tenements affects the Fruits of the Ground in the firſt place, and the Goods on the Ground in the next, for which all Intrometters are liable; ſo that a Landlord of a Tenement, either Rural or Urbane, may not only retain the Goods, but, if they be taken over to the Grounds of another Maſter, may reclaim, or bring them back *de Recenti*.

TIT. VII.

Of Transmission of Rights by Confirmation, and of the Difference betwixt base and publick Infeftments.

Ways of transmitting Feus.

THE *Feu* being thus established in the Vassal's Person, the same may be transmitted, either to universal, or singular *Successors*. The first is properly called *Succession*, which shall be handled in the Third Book. *Transmission of Rights to singular Successors, is voluntar, by Disposition and Assignation; or necessar, by Apprising and Adjudication; and by Confistation, when they are forfaulted for Crimes*, &c.

2. IF the Vassal sells the Land (*a*), the Superior is not oblig'd to receive the Subvassal except he pleases, though the *Charter* bear to him and his Assigns; and if he receive him, there is, in Law, *a Year's Rent due to the Superior, as an Acknowledgment for changing his Vassal.*

3. LANDS are disponed, either to be holden of the Disponer's Superior, and that

(*a*) Sect. 2. Read thus,
If the Vassal sells the Land, the Superior is not obliged to receive the Purchaser, (except he please) tho' the *Dedimus* or Grant in the original Charter bear to the first Vassal, and to his Assigneys; but whenever he receives him there's a Years Rent due to the Superior, as an Acknowledgment for changing his Vassal.

that is called a *publick Infeftment*; because it is presumed, it will be publickly known, being *holden of the Superior*; and it is likewise called an *Infeftment à me*, because the Disponer gives it to be holden *à me, de Superiore meo*: And this *Infeftment* is null, untill it be confirmed * by the *Superior*; which is done by a *Charter of Confirmation*, wherein the *Superior narrates the Vassal's Charter*, and subjoins thereto his own *Confirmation* or *Ratification of it*; and the last Right being first confirmed, is still preferred †.

Tit. 7. Infeftment publick.

* K. J. VI. Par. 5. Act. 66.

† Act sure, said.

4. Sometimes also the Vassal dispones Lands to be holden of himself, and this is called a *base infeftment*, and has been allowed by our Law, (contrary to the Principles of the *Feudal Law*) in Favours of *Creditors*, who getting Right for Payment of their Debts, were unwilling to be at the Expences to get a *Confirmation* from the *Superior*; and this is called an *Infeftment de me*, because the Disponer gives them *tenendas de me, & successoribus meis*.

Base Infeftment.

Inf. de me.

5. These *base Infeftments*, being cloathed with *Possession*, are as perfect and valid as a *publick Infeftment*; for Possession is to an *Infeftment* to be holden of the Disponer, the same thing that *Confirmation* is to an *Infeftment* to be holden of the *Superior*; and therefore, as in a *Competition* betwixt two *Infeftments* of the same Lands, to be holden

holden of the *Superior*, the first *Confirmation* would be preferred, it being a general Rule in Law, that amongst Rights of equal Perfection, *prior in tempore est potior in jure*; so if a *base Infeftment* be clothed with Possession before the *publick Infeftment* be confirmed, the *base Infeftment* will be preferred, though it was granted after the *publick Infeftment*.

Possession Natural and Civil,

6. For the better Understanding of the Nature of *base Infeftments*, it is fit to know, that *Possession* is in Law *Natural*, or *Civil*. That is *Natural Possession*, by which a Man is naturally and corporally in Possession, as by Labouring of the Ground; because sometimes Men could not attain to the *Natural Possession* for compleating their Rights, therefore the Law was forced to allow another *Possession* by the *Mind*, as that was by the *Body*, and this is called *Civil Possession*; because it is allowed and introduced by the *Civil Law*, of which there are many Kinds in *Scotland*: As,

7. Primo, The obtaining *Decreets for Mails and Duties*, and even *Citation* upon an *heritable Right*.

8. Secundo, Payment of *Annualrent*, by the *Debitor to the Creditor*, who has *Infeftment of Annualrent*.

9. Tertio, If a Man be *infeft in Lands*, and for *Warrandice* of these Lands be infeft in other Lands, *Possession of the Principal*

Principal Lands is reputed, in the Conſtruction of Law, Poſſeſſion of the Warrandice Lands. Tit. 7.

10. QUARTO, If a Woman be inſeft by her Husband in a *Liferent*, the Husband's Poſſeſſion is accounted the Wife's Poſſeſſion.

11. QUINTO, If a Man diſpone Lands reſerving his own Liferent, the Liefrenter's Poſſeſſion is accounted the Fiar's Poſſeſſion, and a *baſe Infeftment* is ſaid to be clothed with Poſſeſſion; if he who is inſeft hath attained either to *Natural* or *Civil Poſſeſſion*; for the Law cannot puniſh a Man for not apprehending Poſſeſſion, who could not apprehend it: And for the ſame Reaſon, if the Time of Entry was not come, he who is inſeft by a *baſe Infeftment* will be preferred in that Caſe, as if he were in Poſſeſſion. For altho' our Law conſidering that *baſe Infeftments* were clandeſtinely made betwixt confident and conjunct Perſons, to the Ruin of *lawful Creditors* who could not know the ſame, there being then no *Regiſter of Saſines*; did therefore declare all *baſe Infeftments* to be ſimulate, which were not clothed with Poſſeſſion; yet before the Term, at which he who got the *baſe Infeftment* could enter to the Poſſeſſion, there could be no *Simulation* or *Fraud* in any Party. And in this the Law conſiders much the Intereſt of lawful *Creditors*, by ſuſtain-

ſuſtaining that Kind of Poſſeſſion in their Favours, which would not be ſuſtained in Favours of near *Relations*, or where there is no *onerous Cauſe*: And thus a *baſe Infeftment* given by a *Father* to his own *Son*, will not be clothed with Poſſeſſion by the Reſervation of the Father's *Liferent*, though the *Reſervation* of the Father's Liferent would cloth a *baſe Infeftment* granted by him to a lawful Creditor; and the Husband's Poſſeſſion is accounted the Wife's Poſſeſſion, in ſo far as concerns her *principal Jointure*; but not in ſo far as concerns her *additional Jointure*, in a *Competition betwixt* her and her *Husband's lawful Creditors*.

12. THERE is another Poſſeſſion alſo called *per Conſtitutum*, which is, when a Man, who gets a Wadſet, ſets back the Wadſet-lands to the Diſponer, for Payment of a *Tack-duty*, called, *The Back-Tack-duty*: And the Wadſetter receiving Payment of that *Back-Tack-Duty*, is ſaid to poſſeſs the Wadſet-Lands *per Conſtitutum* (*b*).

13. SOMETIMES likewiſe, for the more Security, a *baſe Infeftment*, which is given to

(*b*) The Poſitions in the preceeding Sections, from 3. to 13. are not in Force Hoc, by Act 13. A. 1690. It is ſtatuted, that all real Rights whereupon Saſines after the Date of that Act are to be taken, ſhall in all Competitions be preferred according to the Date of the Regiſtration of the Inſtrument of Saſine, without Reſpect to the Diſtinction of Infeftments into publick and baſe, or of this laſt Kind, being clad with Poſſeſſion, or not.

to be holden of the *Disponer*, will be confirmed by the Superior (*c*); but that *Confirmation* does not make it a *publick Infeftment*; for no *Infeftment* can be called a *publick Infeftment*, but that which is to be holden of the Superior: But the Use of that *Confirmation* is, that after the *Superior* has confirmed voluntarily the *Sub-vassal's* Right, he thereby acknowledges his Right; and consequently can seek no *Casuality*, which arises upon Want of the *Superior's Consent*, such as *Forfeiture*, or *Recognition*: But, because the *Disponer* is still *Vassal*, therefore his *Superior* will still have Right to the *Rents of the Lands*, by his *Liferent Escheat*; and to *Wards*, and *Non-entries* by his Death (*d*). But, if the *Superior* enter

Tit. 7. Confirmation.

(*c*) Confirmation by a Superior of a base Infeftment, saves these Lands from being challenged for Casualities, which that Superior can claim, *ex delicto* of his immediate Vassal, as Forfaulture, Recognition, Liferent Escheat, &c. (See *Stair's* L. 11. Tit. 3. § 28.) but not from Emoluments and Profits belonging to the Superior, *ex contractu Feudali*, as Wards, Marriage, &c. to which the whole Feu is subjected, and is reckon'd, as if no part thereof had been alienated.

(*d*) A Superior cannot be compelled to give a Charter of Confirmation, or to enter a Vassal as such. Tho' in Defect of an immediate Superior, the next above may, in Course of Law, be forc'd to receive this Under-Vassal, who during his own Lifetime, is in the Allegiance of that Superior, and is free from all Service and Duty to him, who should have been his Superior.

enter the *Sub-vassal* only upon a Charge, (this being no *voluntar Act* of his) that does not cut him off from those *Casualities*.

Resignatio ad Remanentiam.

14. Sometimes likewise the *Seller* resigns the Lands in *Favours* of the *Superior*, if the Lands be sold to the *Superior himself*, which is called *Resignatio ad Remanentiam*; because the Lands are resigned to remain with the *Superior*: And in that Case, the *Property* is said to be *consolidated* with the *Superiority*; that is to say, the *Superior returns to have all the Right both of Property and Superiority*; nor needs he be *infeft of new*, because, (as we *formerly* observed) the *Superior* stands still *infeft*, as well as the *Vassal*; but the *Instrument of Resignation* must be registrated in this Case, as *Sasines* are in other Cases, to put Men *in mala fide* to buy.*

* K. Ch. II. Parl 2. Sess. 1. Act 3.

Resignatio in Favorem.

15. Another *Resignation* is called *Resignatio in Favorem*; which is, when the Seller having sold his *Feu* to a third *Party*, resigns the *Feu* in the *Superior's Hands*, for new *Infestment* to be given by the Superior to that third *Party*.

Procuratory of Resignation.

16. The *Warrant* of both these *Resignations* is a *Procuratory* granted by the *Seller* to a *blank Person*, (and this *Warrant* is ordinarily inserted in the *Disposition*) impowering him to *resign the Feu in the Superior's Hands*; and this is call'd a *Procuratory of Resignation*, and the *Symbols of the Resignation* are a *Staff* and *Bus-*

ton;

tion (e): And accordingly the *Procurator* compears before the *Superior*, and upon his *Knee*, holding a *Staff* or *Pen* (f) at the one End, which the *Superior*, or any having Power from him, holds by the other, whereby he resigns the *Feu*, either *ad perpetuam*, or *in Favorem*, as said is; whereupon an *Instrument* is taken by the Person in whose Favours the *Resignation* is made, which is called the *Instrument of Resignation*; and thereafter, the Person in whose Favours the *Resignation* is made, (if he be not the *Superior*) is *infeft*, and his *Sasine* must be *registrated* within Sixty Days, as said is (g). Instr. of Resig.

17. The *Resignation* does not perfectly *denude* the *Seller*, until Infeftment be taken upon it; and therefore, the *first Infeftment* upon a second Resignation will be *preferred* to him, who has but the second Infeftment upon the first Resignation: But yet the Lands will be in *Nonentry* in the *Superior*'s Hand, after the Resignation is made,

(e) The Lords of Session taking Notice of the Use of improper Symbols at making Resignation, by their Act of *Sederunt*, *Feb.* 11. 1708, discharged the using, in time coming, any Symbols in Resignations, other than Staff or Baton; with Certification, that they will not sustain Resignations by other Symbols, or Sasines following thereon, all which they declare shall be void.

(f) The Pen represents a Baton.

(g) See *Stair*, *Lib.* [illegible] *Tit.* 11. § 4.

Book II. made, until the Person in whose Favours it was made be infeft; for otherwise, the Superior would want a Vassal, since he could not call him Vassal, from whom he has accepted of a Resignation; nor is the Person, in whose Favours the Resignation is made, his Vassal, since he is not yet infeft: But yet the Buyer has a *personal Action* against the Superior, to force him to *denude* himself in his Favours, since he has accepted the Resignation; and he will likewise have an *Action of Damage* and *Interest* against the Superior, if he accept a second Resignation, whereby a prior Infeftment may be taken to his *Prejudice*; and, until Infeftment be taken, the Superior gets all his *Casualities*, as *Ward*, *Marriage*, *Life-rent Escheat*, &c. not by him, in whose Favours Resignation is made, but by him who resigns, since he remains still Vassal, till the other be infeft *quoad* the Superior's *Casualities*.

TIT. VIII.

Of Redeemable Rights.

Redeemable Rights:

ANOTHER considerable *Division of heritable Rights* with us, is that some are *Redeemable*, and some *Irredeemable*.

2. REDEEMABLE *Rights are those, which return to the Disponer, upon Payment of the Sum*

Sum for which such Rights are granted, and are so called, because they may be *redeemed* by the *Disponer*; and they are either *Wadsets*, *Infeftments of Annualrent*, or *Infeftments for Relief*.

Wadsets.

3. A *Wadset* is a Right, *whereby Lands are impignorated or pledged for Security of a special Sum*, which passes by Infeftment (like other real Rights,) in the Terms of *Alienation* or *Disposition*; and the *Disponer* does secure himself by getting a *Reversion* from the *Buyer*, wherein he grants and declares *the Lands redeemable from him upon Payment of the Sum then delivered, and of the Annualrent thereof*, which is Pactum de retrovendendo; and expresses the Place and Time, when and where it is to be *delivered*, and in whose Hands it is to be consigned, in Case the Receiver of the *Wadset* refuse to accept his Money. Reversions may be either granted by a Paper apart, or they may be contained in the Body of the Right, and are then said to be *incorporated in Gremio Juris*.

Reversions.

4. These *Reversions*, being against the *Nature of Property*, and depending upon the mere Agreement of Parties, are to be most strictly observed, and are *strictissimi Juris*; so that they are not extended to *Heirs* or *voluntary Assignees*, except they be *expressed*. But yet they may be *prorogated*, which is allowed for the Good of Commerce, though a Comprifer be in Esse

Judicial Assignees, Reversions must be fulfilled in the very Terms; and it is not enough, that they be fulfilled in *equipollent Terms*. But after an Order of *Redemption* is used; that is, after the Granter of the *Wadset has duly premonished the Wadsetter*, and consigned the Sums due by the *Wadsetter*, it may be assigned; and though the Reversion bears that Premonition be made at the *Parish Church*, it will be sustained, if it be made personally to the *Wadsetter*, for that is a surer *Certioration*.

3. REVERSIONS, albeit of their own Nature they are *personal, binding* only the Granter and his *Heirs*, yet they are *real Rights by our Statutes*, and affect singular *Successors*. *K. J. III. Act 28.

6. ALL *Reversions* (except they be incorporated as said is) and all Bands to make *Reversions*, or *Bikes* to *Reversions*, must be registrated within 60 Days in the same Register with *Sasines*; for else a *singular Successor* is not obliged to regard them †: For, if the Reversion is not duly registred, any Person Purchasing the Land irredeemably from the Wadsetter, will be secute against the Reverser; but such Reversion would be still valid against the *Disponer* and his *Heirs* without *Registration*. †K. J. VI. Par. 22. Act 16.

7. WHEN the Granter of the *Wadset* is to use an *Order of Redemption*, he must premonish the *Wadsetter* to compear, (and take *Instruments* thereupon, called an *Instruments* Order of Redemption.

strument of Premonition) to receive Payment of the Sums due to him; and at the Time and Place appointed by the *Reversion*, Offer being made of the Money; if the *Wadsetter* refuses voluntarily to renounce, and to accept his Money, it is consigned in the Hands of the Person designed in the *Reversion*; or, if no Person be designed, it may be consigned in any *responsal Man's Hand*: But there must be a *Paper* taken under the *Consignatar's Hand*, acknowledging, that it was consigned in his Hands; for, though an *Instrument* under a *Notar's Hand* proves, that all this Order of *Redemption* was used, yet it will not prove the *Receipt* of a Sum against the *Consignatar*. [Fig. 8.]

Voluntar Redemption

8. If the *Wadsetter* receive his Money, and *renounce voluntarily*, this is called a *voluntar Redemption*: But, because though *Renunciations* be sufficient to extinguish a *Wadset*, (if no Infeftment followed) whether the *Wadset* was to be holden of the Granter or Superior, or to extinguish it, *quoad* the Granter and his Heirs, though Infeftment followed; yet, if the *Wadset* was given to be holden of the *Disponer*, the *Wadsetter* must resign *ad Remanentiam*, in the *Disponer's* Hands, as his Superior; and thereafter the *Disponer* needs not to be infeft of new, as no Superior needs: But, if the *Wadset* be given to be holden of the Superior, then the *Disponer* uses to take a *Letter of Regress*, whereby the Superior

Letters of Regress,

Book II. obliged to receive back his Vassal, when he shall redeem his own Lands; for otherwise after the Wadsetter is seised, the Superior is not obliged to receive him back. But the Lands being redeemed, the Superior may be charged to infeft him, which is necessary for re-establishing the Right in his Person.

Declarator of Redemption.

2. If the *Wadsetter* refuses to renounce after the Order is used, the Lords will *force him to renounce*, and declare the Lands redeemed, and in Practice, called a *Declarator of Redemption*; after obtaining of which Declarator, the Lands are redeemed, and belong to the Redeemer, and the *Wadsetter* will upon a single Charge of Horning, force the *Confirmator* to deliver him up the Money.

3. The Use of the Order of Redemption may pass from it at any Time before *Declarator*, and therefore the Sums for which the *Wadset* was granted, are still heritable before *Declarator*, but after that, they are moveable, and fall to Executors, though the Declarator be obtained after the *Wadsetter's Death*, in which Case they remain heritable. And though the *Wadsetter* require his Money, he may pass from his Requisition, either directly, by a clear *Declaration* that he passes from it, or indirectly, by incurring with the Duties of the *Wadset-Lands*, or by taking Payment for Terms subsequent to the Requisition.

II. WADSETS

11. WADSETS are either *Proper*, or *Improper*.

Wadsets Proper & Improper.

12. PROPER *Wadsets* are these, wherein the *Wadsetter* takes his *Hazard* of the Rents of the Land, for the satisfaction of his *Annualrent*; and pays himself all publick Burden.

13. IMPROPER *Wadsets* are these wherein the Granter of the *Wadset* pays the publick Burdens, and upholds the Rent (a), and the Receiver is at no Hazard, but has his *Annualrent secure*. And if a *Wadset* be taken so, that the *Wadsetter* is to have more than his *Annualrent*; and yet the *Granter* is to pay the publick Burdens, and free him of all Hazards: This is accounted *Usury* by our Law; the Punishment whereof is *Confiscation of Moveables*, *loosing of the principal Sum*, and *annulling of the Usurary Contract or Paction* *. And by a late Statute, *If the Debitor, owner in a proper Wadset* (b), *offers Security for the Money, and craves Possession, the Wadsetter must either quit his Possession, or restrict himself to his Annualrent* †; or, if it be an *Improper Wadset*, the *Wadsetter* must impute the *Superplus*, more than pays his *Annualrent*, in *sortem*. And, if a Man *impignorate* his

Usury:

* R. J. VI. Par. 14. Act 222.

Par. 15. Act 247.

† K. C. II. Par. 1. Act 62.

(a) I have added, *and upholds the Rent.*

(b) The Act cited in the Margine concerns Wadsets only, that were granted between 1641 and 1661.

Book II. Lands (e), or Bonds, with express Condition, that *if the Money be not payed at a precise Day, they shall not be thereafter redeemable*: The *Law* reprobates this unjust Advantage, called *Pactum legis Commissoriæ in pignoribus*; and will allow the Money to be offered at the Bar; or, they will allow a short Time before extracting of the *Decreet* for Payment of it.

Pactum legis commissoriæ.

TAKING of *Annualrent* having been discharged by the *Canon Law*, Men did buy *Annualrents* out of other *Men's Lands*, which was *the Origin of our present Infeftments of Annualrent*, and *continues till now*: By which, if Men resolve not *towards the personal Security of the Borrower*, they take him also obliged to infeft them in a yearly *Annualrent*, payable out of his Lands, correspondent to the *Sum lent*; but, if they exceed the *ordinar Annualrent* allowed by Law, it will *infer Usury*; and so they have a double Security, one personal against the Borrower for Payment, and

Infeftment of Rent.

(e) When Lands are sold for an adequate Price, with the Provision of a *Jus Retractus*, in Favours of the Seller, *i. e.* a Power and Right to redeem within a determin'd Space of Time, with a Clause irritant, declaring, *That the Seller shall lose the Privilege of recovering the Lands; if it be not done within the Time, and in the Manner stipulated*; this Irritancy is not to be reckoned *quasi Pactum legis Commissoriæ*: However, in this Case, it is advisable for the Purchaser, to raise against the Seller a Declarator, that he has lost the Power of Redeeming.

and another real against the Ground, it being *debitum fundi*, for which they may poind any Part of the Ground; as also, they have good Action against the Intromitters, with the *Duties of the Lands*, out of which their Annualrents are payable; though they cannot poind or exact from the Tenants any more than they owe to their Master *; if the Tenants compear and instruct what they were owing the Time they got the Citation, by producing the Master's Discharges. Tit. 8.

* K. J. III. Act 36.

15. THESE Annualrents require a special Sasine, like Wadsets, and other real Rights: The Symbols whereof, if the Annualrent be payable in Money, is a Penny of Money; but, if it be payable in Victual, it is a Parcel of Victual.

16. THIS is singular in Infeftments of Annualrent, that Appriſings thereupon will be preferred to all prior Appriſings, *quoad* the Bygones of the Annualrent, if the Infeftment of Annualrent was prior to thoſe Appriſings, to which the Appriſing will be drawn back, and preferred to any interveening Right: Which Privilege is contained in the *late Act of Parliament*, concerning Debitor and Creditor †.

† K. C. II. Par. 1. Act 62.

17. THESE Infeftments of Annualrents, being properly granted for Security of Sums, are extinguiſhed not only by Reſignations, but by Renunciations; and even by Intromiſſion, with as much as might

Book II. might pay the principal Sum, which Intromission is provable by Witnesses, whether the Rent be Victual or Money: And therefore, singular Successors buying Infeftments of Annualrent, are not secure by any Register, but must rest on the Warrandice of the Seller.

Infeftments of Relief. 15. INFEFTMENTS of Relief are these, which are granted by a principal Debitor to his Cautioner, for Security and Relief of Sums he stands bound for him, upon which the Cautioner cannot enter to Possession, till he be distressed; and, when the Sum is payed by the Principal, the Right becomes absolutely null, as being but a temporary Right; and so the principal Debitor who granted the Right, needs not be of new infeft, but his former Right revives (d).

(d) The last Section of this Title in former Editions, being full of Mistakes, is reformed.

TIT. IX.

Of Servitudes.

THE Nature and Constitution of Property and real Rights being explained in the foregoing Titles, we shall now treat briefly of Servitudes, which are Burdens affecting Property and Rights.

1. SERVI-

2. Servitudes are either *Real*, or *Personal*.

Servitudes Real and Personal.

3. Real Servitudes are, *whereby one Man's Property or Ground is affected with some Burden, for the Use and Behoof of another Man's Ground*, directly; and indirectly *for the Proprietor's Use, as having Right to that Ground*: Which are divided into *Rural Servitudes*, and *Urban* or *City Servitudes*.

Rural Servitudes, Actus, Via

4. Rural *Servitudes* are, *Iter*, which is a *Power of going through our Neighbour's* Lands; *Actus*, *is a* Power *of driving Carts or Wains*; *Via*, *is the Privilege of having High-ways in our Neighbour's Ground*; and *Aquæ ductus*, which is a *Power and Privilege to draw Water along it their Ground for watering of our own*: And thus *Via* includes *Iter* and *Actus*, as the lesser *Servitudes*; so he that has a *Via*, has also a Power to drive Carts and Wains, and to walk himself through the Ground burdened with the *Servitude*, and of drawing Stones and Timber through the Ground of the servient Tenement.

City Servitudes.

5. The *City Servitudes*, called *Servitutes Urbanæ*, are chiefly five.

Oneris ferendi.

6. The first is, *Oneris ferendi*, which is a *Privilege, whereby one, who has a House in the City, can force the Proprietor, who has a House below his, to bear the Burden of his House*; and he may force the Owner of the servient Tenement to repair it, and make it fit

Book II. fit for supporting the *dominant Tenement*, contrary to the *common Nature of Servitudes*.

Tigni immittendi. 7. SECUNDO, *Tigni immittendi*, which is the Privilege of *forcing our Neighbour to receive into his House the Joist of ours.*

Stillicidii. 8. TERTIO, *Stillicidii vel Fluminis*, which is, *whereby our Neighbour is obliged to receive the Drops which fall from our House*; under which is likewise comprehended the Privilege *of carrying away our Water by Sinks and Channels.*

Non officiendi Luminibus. 7. QUARTO, *Non officiendi Luminibus*, whereby he can do *nothing that can prejudge our* Lights.

Altius non tollendi. 10. QUINTO, *Altius non tollendi*, whereby our Neighbour *cannot raise his House higher*, to *prejudge* the *Lights* of the *dominant Tenement*; which he may otherwise freely do, if he be not restrained by this Servitude.

11. By *our Law*, *Servitudes* may be constituted without any *Sasine*, because they are *incorporeal Rights*; but, though a Servitude merely established by Writ be sufficient against the Granter, yet they are not valid against singular Successors; except that Right be clothed with Possession, which completes the *Servitude*, and makes it a real Right: And they may be likewise established by *Prescription*, without any *Writ* from him, who has the *servient Tenement*; though he, who is to acquire the *Servitude* by *Prescription*, must have a real

real Right in his Person of the Lands, to which he prescrives the Servitude.

12. The *ordinary Servitudes* superadded by us to these of the *Civil Law*, are the Servitudes of casting *Feal* and *Divot*, *common Pasturage*, and *Multures*.

13. Common *Pasturage is a Right of pasturing the Goods and Cattle of the dominant Tenement upon the Ground of the servient*, which is constituted frequently by a *Charter*, containing the *Clause of common Pasturage*; and sometimes by a *personal Obligement* clothed with *Possession*; but, albeit it be *indefinite*, yet it can reach no further than to the *Proportion of Goods*, effeiring to the Rent of the *dominant Tenement*, and which they may keep and fodder in Winter; which is done by *Sowming* and *Rooming*, that is to say, the *determining the Proportion of Goods belonging to each dominant Tenement, by assigning them particular Rooms according to their respective Rents.*

Common Pasturage.

Sowming & Rooming.

14. Common *Pasturage* in our Law, does ordinarily comprehend all the lesser Servitudes; such as the casting of *Feal* and *Divots presumptively* only; for the one may be possessed without the other: Nor will common Pasturage infer a Servitude of casting of *Feal* and *Divots*, if he, who possessed the common Pasturage was interrupted as to the casting of *Feal* and *Divot*.

Common Pasturage.

15. Thirlage

Thirlage Mills.

15. THIRLAGE is that *Servitude*, *whereby the Lands of one Heritor are to pay some Duty to the Mill of another.*

16. MILLS are *inter Regalia*, and require therefore a special Sasine; the Symbols whereof are *Clap* and *Happer*; but, if the Mill be in a Barony, *transit cum Universitate* (a).

Multures.

17. MILLS are ordinarily disponed with *Multures* and *Sequels*; the *Multures* are a *Quantity of Corn, payable to the Heritor of the Mill for Grinding*. The *Knavelship*, *Loft and Bannock*, are a small Quantity payable to the Servants for their Pains.

Insucken and Outsucken Multures.

18. THESE Quantities that are paid by those that are *thirled*, are called *Insucken Multures*; and those Quantities that are paid by such as come voluntarily, are called *Outsucken Multures*.

19. THIRLAGES are constituted by *Writ*, or by *Prescription*.

20. THE Ways of constituting *Thirlage* by *Writ*, are these:

21. FIRST, When a Master *thirles* his own *Tenants* to his own *Mill*, in which Case,

(a) The Reason why a Mill, not united to another Tenement, requires a several Sasine, and that by a peculiar Symbol, is, That the Law considers it as a separate Tenement: The common and ancient Saying, That Mills are *inter Regalia*, is now an improper Way of speaking; because any Heritor may, without Warrant from the Sovereign, build a Mill on his own Land, and convey it to his Tenants.

Case, ordinarily he diminishes the Rent of his Land, *in Contemplation* of what they are to pay to the *Mill* for grinding their *Corns*, which he does by an Act of his own Court. Tit. 2

22. SECUNDO, When an Heritor sells his Lands to be holden of himself, and *thirles* his *Vassal* to his *Mill*; in which Case, he sells so much the cheaper, and so the *Multures* are just.

23. TERTIO, When the Heritor of a *Mill dispones his Mill*, with the *Multures* of his own Lands, in which Case the *Multures* are also just; because, he gets so much the more for his Mill; and so this Servitude is not so odious, as it is believed to be.

24. QUARTO, If a Man dispones the Mill of a Barony, *cum Multuris*, or *cum astrictis Multuris*, in either of these Cases, he thereby astricts his whole *Barony*; though not formerly astricted: But, if he dispone the Mill of the Barony, *cum Multuris solitis & consuetis*; he is thereby understood to have *thirled* only what was formerly *thirled* (b).

25. If

(b) When one dispones his Mill, by designing it, the Mill of the Barony of A. *cum Multuris*, &c. the Law interprets the Intendment, to be an Astriction of the whole Inhabitants and Tenants of the Barony; and by our Practick, they are accordingly astricted. It would be otherwise, if the Mill were not designed, as above.

25. If the *Thirlage* bears *omnia grana crescentia*, all the Corn growing upon the Land will be *thirled*, with *Deduction* only of *Seed* and *Horse-corn*, and the *Farm*, except it be carried to another Mill; for it is presumed *Farms* must be sold.

26. QUINTO, When *invecta & illata* are *thirled*, all *Corns*, which thole Fire and Water within the *Astriction* (c), must pay *Multure*, though they come not to the Mill; and tholing Fire and Water, in this Astriction, is so interpreted, as to extend only to *Corns that are steeped and kiln'd*.

27. THE Way of constituting *Thirlage* by *Prescription*, is *immemorial*, *or forty Years Possession*, by Virtue of some *Title*; such as a Decreet, though in Absence; and even when the *Master* is not called: And any Act of a *Baron Court*, though made only by a *Baillie*, without a special Warrant from the *Heritor*, is a sufficient Title for *Prescription*: And though the coming to a *Mill past all Memory*, (b) *and paying thirle Multure*, does not astrict the Comers for the future; it being a general Rule in all *Servitudes*, that, *ea quæ sunt meræ facultatis non præscribuntur*; yet in *Mills* of the *King's Property*,

(c) Tholing Fire and Water is applied to Brewing; so that, not only the Malt made within the District of the Thirlage, but all Malt (where-ever it was made) browen within the Astriction must pay Multure: as is practised within the Town of *Edinburgh*, and other Places.

(b) I have added, *and paying thirle Multure*.

Property, immemorial Possession constitutes a *Thirlage*: And, if Men likewise pay *dry Multures*, that is to say, such a Quantity, *whether they come to grind or not*, for Forty Years, they will be thereby astricted; for it is not presumable, they would have paid *dry Multure* for so long a Time, except they had been *thirled*. Tit. 3. Dry Multures.

28. If the Quantity to be paid be not determined in *Writ*, it is regulated by the Use of Payment for Forty Years.

29. Those who are *thirled*, are also obliged to maintain the *Mill*, *Mill-dams*, *Water-gangs*, and to bring Home its *Mill-stones*.

30. If such as are *thirled* bring not their Corns, they are pursued by an Action called *abstracted Multures*.

31. There are two Rules to be observed in all *Servitudes*.

32. Primo, *Res sua nemini servit*, no Man can have a *Servitude* on what is his own; and therefore, if the Land on which we have a *Servitude* become ours, the *Servitude* is *extinguished*.

33. Secundo, When we have a *Servitude* on any other Land, this *Servitude* affects every Foot of that Land, *unaquæque gleba servit*; but this is to be taken *moderate, & non judaice*; so that it must be reasonably used: And thus, if we *lay out* some *Ares*, with Privilege to the Cows, to cast *Peat* and *Divot* upon our Muir, for

maintaining his Houses; though, in strict Law, every Part of the Muir is affected with the *Servitude*: yet the Lords will allow any Man to Till and Sow his own Muir, leaving such a *Proportion*, as may maintain these Houses.

Personal Servitudes.

34. PERSONAL *Servitudes* are, *whereby one Man's Property is affected with some Burden, tending directly to the* Utility and Profit of another Man: And, by the *Civil Law*, are divided in *usufruct*, *Use* and *Habitation*.

35. USUS *fructus* is called *Liferent in our Law*, which is a *Right to use and dispose upon any Thing during Life; the Substance thereof being preserved*.

36. USE and *Habitation* were restricted to the *naked Use of the Liferenter*; whereby his Power of *disposing* and making *Profit* of the Thing *liferented* was restrained, and are not in Use with us.

Liferents, and their Division.

37. LIFERENTS are either constituted by *Paction*, or by *Law*: *Liferents* by *Paction*, are either by *Reservation*, as when a *Fiar denudes himself* of the *Fie* in *Favours* of another, *reserving* his own Liferent, or by a new Constitution; as, when the *Fiar* dispones his Lands to another, during all the Days of his Life; the first needs no Infeftment, but the second does; else it is not valid against *singular Successors*: But the Liferenter being infeft, transmits his Rights to any, by Assignation, without Infeftment: For, it being a *Servitude*, and

perso-

personal Right, it neither needs, nor can admit of a Subaltern Infeftment. Tit. 9.

38. A Liferenter also, by Reservation, may enter the Heirs of Vassals, (though he cannot receive singular Successors) if he was himself infeft; but another Liferenter cannot; and even a Liferenter by Reservation cannot enter those Vassals, if he was not once infeft, because he cannot transmit a Right which he has not.

39. When more Persons are jointly infeft, they are called *conjunct Fiars*; but, though a Wife be a *conjunct Fiar*, yet her *Fie* lasts but during her Life; and during her Life she may enter Vassals, and has Right also to all the *Casualities*, as other *Fiars*. Conjunct Fiars.

40. Liferents *by Law*, are the *Terce* and the *Courtesy*. Liferents by Law.

41. The *Terce* is a *Liferent* of the *Third of all the Tenements, wherein the Husband died infeft, provided by Law to a Wife*; which is explained before, *Tit. Marriage* (e) which *Terce* is constituted by an Inquest, who, upon a *Brief* out of the *Chancellary*, directed to the *Sheriff*, or other *Judge ordinary*, do serve her to a *Terce*: Upon which Service the Judge, to whom the *Brief* was directed without *returning* it, divides the *Land* betwixt the *Heir* and *Relict*, and expresses the *Marches* in an *Instrument*; and this is called to *bound her to her Terce*: the *Marches*

(e) See Book I. Tit. 6. § 16.

K

Marches being *kenned* by the *Instrument* (*f*); And, though the *Service* gives her Right to the Third of the *Mails* and *Duties*, yet she cannot remove *Tenants* thereby, till she be *kenned to her Terce*, or the same otherwise divided; because, before Division, she bruiketh the *Terce pro indiviſa*, with the *Proprietar*.

Brieves.

42. This *Brieve* contains two Points; *First*, That the *Bearer was lawful Wife* to the Defunct; And, *Secundo*, That he died *infeft* in such *Tenements*: But, if the *Relict* was holden and reputed *lawful Wife* in her *Husband's Life*, no Exception in the contrary will stop the Service * (*g*).

* K. J. IV. Act 77.

43. There is no *Terce* in *Burgage Lands*, *Feu-duties*, or other *Caſualities* of the

(*f*) The Form and Manner of kenning a Terce, is at large set down by *Craig*, *Lib* 11. *Dig.* 22. § 29. *P.* 310.

To the serving a Brief of Terce, it is not requisite to cite the Heir, either personally, or at his Dwelling-house.

(*g*) The Inquest being satisfied with the Answer made to the two Points of the Brief, and with the Proofs thereof, they determine, and find a Terce of the Lands in the Claim, belongeth to the Relict; Thereafter, the Sheriff causes the Heir, (if present) or one for him, (if absent) cast Lots or Cavels for determining where the Division shall begin, *i. e.* if at the East, or at the West, for no other thing is meant, by the Sunny Part, and by the Shadowy Part; and if the Lot fall on the first, the Beginning is at the East Side of the Land, and they number the first and second Acre to the Heir, and the third to the Relict, which is meith'd by March stones, or other Marks, &c.

the Superiority, nor in *Reversions*, *Tacks*, nor *Patronages* (*b*).

44. The *Courtesy* is a Liferent granted by *Law to him, who married an Heretrix, of all her Heritage, and of that only*: Needs neither Sasine, nor other Solemnity to its Constitution; but is *ipso jure*, continued to him; if there were Children procreated of the Marriage, who were heard to cry, though the *Marriage* dissolved within *Year & Day*(*i*). Courtesy.

45. All these Liferenters are obliged to find Caution to preserve the Thing liferented, and to leave it in as good Condition as they found it, which is called *Cautio Usufructuaria*; and they are also bound to aliment the appearand Heir, if he have not *Aliunde*, to aliment himself *. *K. J. IV. Act 25. Cautio Usufructuaria.

(*b*) Tho' there's no Terce of Burgage Lands, yet Rural Tenements admit a Division, by which the Relict gets the second principal Dwelling house commodious for Habitation; and, if it be not so, the Heir must afford her one; or divide with her the principal Mansion-house: The like is observed in other Office-houses, as Stables, Byres, Barns, Barn-yards, &c. Annualrents, Tithes, Pasturage, and Feuel, is also divided. See *Craig. Lib.* 11. *Dig.* 22. § 26, 27, &c. *P.* 309.

(*i*) The Terce is due, tho' the Marriage continue no longer than Year and Day, and tho' there be no Children; but the Husband living with his Wife Heiress, 60 Years and upwards, if there was never a living Child, (which is judg'd by its Greeting, &c. after Birth) gets no Courtesy.

It is due to a second Husband, albeit there be Children of the first Marriage alive. For more of this, see *Craig. Lib.* 11. *Dig.* 22. § *ult. P.* 313.

146. THE Legal Terms of all Liferents, are *Whitsunday* (*k*) and *Martinmas*: And therefore, if a Liferenter survive *Whitsunday*, or die upon the *Whitsunday* in the Afternoon (*l*), her Executors have Right to the half of the *Liferent Duties* for that Year, whether they be payable in *Victual*, or *Monies*: And, if she survive *Martinmas*, or die upon *Martinmas* Day in the Afternoon, her Executors have Right to the *Liferent* Duties of that whole Year, and that whether it be *Land-Rent*, or the *Rent of a Mill*, albeit the *Conventional Terms* were after *Martinmas*. But, if *Liferenters* labour the Lands themselves, their Executors will have Right to the whole Rent thereof, at whatever Time their Death happen.

THE END.

(*k*) By *Act* 34. *Parl.* 1693. it is declared, *That the* 15th *Day of May, was, since* July 22. 1690. *and shall be in all Time coming, the Place of the former Term of Whitsunday, to all Effects whatsoever.*

(*l*) It seems, that in ancient Times, we began the Day at twelve a Clock of Day, and made the Afternoon or the Evening, the first Half of it, after the Custom of the Jews of old Times; *Gen.* i. v. 5. *And the Evening & the Morning were the first Day*, which was, and is the Custom of the Church in solemn and sacred Oaths and Festivals. And that in the Matter of this Section, the Term Day behoved to be complete. But now, it seems, we compute our Term Days (all which the Festivals of the Church) in the same manner with our ordinary Days, which begin at twelve a Clock of Night, and that with Respect to Liferents, *dies cœptus habetur pro completo*. For, in the Case of *Robert Peterson*

ſon, Widower of *Iſabel Dickſon*, who was Relict of *Thomas Young* a Brewer in *Edinburgh*, againſt the Heirs of the ſaid *Young*, the Lords found, *That albeit Dickſon died at five of the Clock in the Morning of* Martinmas *Day, Anno* 1699, *yet the Husband had Right to the Intereſt of a Principal, liferented by his Wife, and payable at that Term.* The ancient Practick was opponed, and rejected. Tit. 10

TIT. X.

Of Teinds.

TEINDS, being a Burden affecting Lands, fall in to be conſidered in this place. Teinds.

2. TEINDS are defined to be that *ſpecial and liquid Proportion or Quota of our Goods and Rents lawfully acquired, that is due to* GOD, *for maintaining his Service.*

3. IT ſeems our Law has followed the Opinion of thoſe Divines, who think that ſome *Proportion* of our Goods is due by *Divine Right*; for we ſay, that *Teinds are the Spirituality of the Churches Revenue*; but that the Proportion is not *Juris Divini*, for we alter the Proportion by ſpecial Laws and Cuſtoms; though for diſtinctions ſake we call this *Proportion* the *Tenth*.

4. BY the *Canon Law*, they are divided into * *perſonal Teinds*, which *ariſe out of the perſonal Gain and Profits that a Man has by his Trade or perſonal Induſtry* †: *Predial Teinds, which ariſes from the natural Products of the Land that Men poſſeſs. And mixt* * Perſonal Teinds.

† Predial Teinds.

Book II. *Teinds, which ariſe from the Profits that Men by their perſonal Induſtry make out of their Lands.*

Parſonage and Vicarage Teinds.

5. THEY are likewiſe divided into *Parſonage Teinds*, which are due to the *Parſon*, and *Vicarage Teinds*, which are due to the *Vicar*; and regularly, all *Teinds* are due to the Incumbent, who ſerves the *Cure*; ſo that if the *Incumbent* be a *Parſon*, he has a Right to the *Parſonage Teinds*; and if he be a *Vicar*, he has Right to the *Vicarage Teinds*.

6. THE Teinds of Corn are called *Parſonage Teinds*, or *Decimæ garbales*; and the *fifth Boll* of the free Rent is ſtill *Teind* with us: And all Lands muſt pay *Teind*, except they be ſuch as have been feued out of old by *Churchmen* before the *Lateran Council* (4) (by which they were prohibited to alienate the Teinds) and who had Right both to *Stock* and *Teind*; and where the Teinds were never known to have been ſeparated from the Stock.

7. SOME *Monks* likewiſe got particular Exemptions from paying Teinds for theſe Lands, which they themſelves did bring in and cultivate; and with us the Privilege granted to *Temple Lands*, which belonged of old to the *Knights of St. John*, *a Religious Order*, and to the Monks of the *Ciſtertian Order*, are continued to thoſe, who have Right to their Lands, with that *Ex-*

(4) This Lateran Council was holden under Pope *Alexander* III. *Anno Dom.* 1179.

Exemption: *Manſes* and *Glebes*, are likewiſe free from payment of *Teinds*. Tit. 10. § 2.

8. VICARAGE Teinds, are called the *ſmall Teinds* with us; becauſe they are payable out of inconſiderable Things, ſuch as *Lambs*, *Wool*, *Cheeſe*, *Eggs*, &c. and they are ſaid to be *Local*, becauſe they are payed according to the Cuſtom of the Place; ſo that in the ſame Pariſhes, ſome Heritors will be liable for *Vicarage Teinds* of different Kinds: For though no Man can preſcribe a Liberty from Payment of *Parſonage Teinds* ſince the *Lateran Council*; yet, as forty Years Poſſeſſion is a ſufficient Right to a Miniſter for *Vicarage Teinds*; and as it does determine the *Quota*, as well as the Species of *Vicarage Teinds*; ſo by forty Years Freedom, the Heritor is ſecure in all Time coming from Payment of *Vicarage Teinds*.

9. WHEN *Popery* was ſuppreſs'd, all the Lands belonging to *Monks* and others, were annexed to the Crown, in *Anno* 1587*; but the Teinds belonging to them, were not annexed; theſe being acknowledged by our Law to be the *Patrimony of the Church*; and they are therefore called, the *Spirituality of the Benefices*. *K. J. VI. Par. 11. A. 29.

10. THE Monaſteries of old having gotten ſeveral Pariſh Churches mortified to them, whereby they had Right to their *Parſonage Teinds*; ſuch as got thoſe Monaſteries erected in their Favours, became there-

Book II. thereby to have Right to other Mens Teinds: And great Emulation, as well as Prejudice, arising from Mens not having Right to lead their own Teinds.

11. KING *Charles* the first, did therefore prevail with all the saids Titulars of Erection, to submit what should be paid them, as the Price of the saids Teinds; and His Majesty did determine, *That the Rate of all Teinds should be the fifth Part of the constant Rent, where the Stock and Teind were accustomed to be set jointly*; but where the Teinds were set separately from the Stock, the Heritor did, in the Valuation, get down a fifth Part of what was proven and valued to be the Rate of the Teinds; and which Deduction is called the *King's Ease*; because it was given by him in his Decreet Arbitral. It was also ordained, *That the saids Teinds being valued, should be bought at Nine Years Purchase* (b).

*K. C. I. Par. 1. Act 17. and 19. K. Ch. II. Par. 1 Sess. 1. Act 61.

12. FOR

(b) By *Act 23. Parl. July* 1690, concerning Patronages, it is declared, *That the Rights of Tithes not heritably disponed, shall belong to Patrons of the Parish, within which the Lands lye, with the Burden of the Ministers Stipend, Augmentation thereof, Tacks, future Prorogations, Erection of new Kirks, as shall be found expedient, with this Provision, That these Patrons shall be obliged to sell to each Heritor the Tithes (they have Right to by that Act) of his own Land, at the Rate of Six Years Purchase, as they shall be valued, which is extended to the Patrons of Burrows, by Act 25. Parl.* 1693. Now, the

Tit. 10. Valuation of Teinds.

12. FOR effectuating this Determination, the Parliament 1633, appointed some of their own Number, to value the saids Teinds; and after a Process for *Valuation* is raised before these Commissioners, in which the *Titular*, *his Tacksman*, and the Minister are to be cited, the *Heritor* in the mean time gets the leading of his own Teinds.

13. THE Probation is oft-times allow'd to both Parties in this Court; and where one Party is preferred, it is called the *Prerogative of Probation*, and is much contended for, and is thus regulated, *viz.* either the Teinds are drawn *ipsa corpora* by the *Titular*, or *Tacksman*; and then they have the sole Probation allowed them, to prove what the Teinds were worth, (they proving that they led seven Years of fifteen before 1628.) or else they have Rental Bolls paid them; & *eo casu*, they have the sole Probation likeways, they proving twenty Years Possession of uplifting Rental Bolls, condescending upon *Quantity* and

the above Act having abolished *Patronages*, and the Patron being obliged to sell the same to the Heritors of the Parish at the Price of 600 Merks, did, in further Recompence give to the Patron, the Tithes, as above: But seeing Patronages are restored, and the above Act, in relation to the Manner of calling of Ministers to vacant Churches abolished, it may be thought, that the above Grant made to Patrons so divested, falls,

and *Quality*: Or *Tertio*, the Heritors have Tacks of their own Teinds for Payment of *Silver Duty*; and then there is *joint Probation* allowed both to *Heritor* and *Titular* (*c*).

14. ECCLESIASTICK Persons, such as *Bishops*, *Parsons*, &c. submitted only what they were not in Possession of; and therefore there can be no Valuation led of any Teinds, *Parsonage* or *Vicarage*, which they were actually in Possession of (*d*): But by a Letter from His Majesty thereafter, in *Anno* 1634, it is declared, *That if their Teinds be set to Tacksmen, they may be valued during the Tack; whereas the Teinds they were in the natural Possession of, cannot; though*

(*c*) By *Act* 30. *Parl. July* 1690, it is declared, *That in all Cases of Valuation, the Heritor shall have a joint Probation.*

(*d*) By *Act* 30. *Parl. July* 1690. Tithes belonging to Ministers, and possess'd by them, may be valued; but cannot be sold or bought.

But by *Act* 23. *Par.* 1693, made for renewing the Commission for Valuation and Sale of Tithes, &c. it is declared, *That the Commission shall not be extended to the buying or selling of Tithes which formerly pertained to Bishops, and now belong to the King, by the Abolition of Prelacy, so long as these Tithes remain in His Majesty's Hands undispon'd. Nor to Tithes belonging to Colleges or Hospitals, or to such as are mortified and destined to pious Uses, without prejudice to the valuing of these Tithes according to Law, and the Heritor to be thereafter liable in Payment of the valued Tithe-Duty.*

though Teinds holden of Collegiate Kirks may be valued, and ſo may be bought and ſold. Tit. 10.

15. The Burroughs are only decerned to ſell the Superplus of the Teinds they had Right to, over and above what will be due for the Entertainment of their Miniſters, Colleges, Schools and Hoſpitals.

16. After the Teinds are valued, and the Titular decerned to ſell; or if the Titular be willing to ſell without a Decreet, the Heritor is infeft, and ſeiſed by the Titular, who, in the Diſpoſition or Charter, reſerves to himſelf Relief of the *King's Annuity*, and of all *Impoſitions* laid, or to be laid upon Teinds; and Warrands only from his own, and his Predeceſſors Facts and Deeds: And on the other Hand, the *Heritor* who has got a Decreet of Valuation only, and not of Vendition, is obliged to infeft the Titular, for *Security of the valued Bolls.*

17. By the foreſaid Decreet Arbitral, the ſeveral Pariſh Kirks were to be provided; and therefore the Titular might allocate any one Heritor's Teinds for Proviſion of the Miniſter, which renders the Privilege of buying very ineffectual to the Heritor (*e*); whereas it had been much better, that

Burdens affecting Teinds.

(*e*) The Parliament 1693, conſidering the buying of Tithes in Favours of Heritors, had been much hindred by Patrons, Titulars and Tackſmen of Tithes, offering to allocate to the Miniſter

Book II. that the Stipend had been proportionally laid upon all the Heritors.

18. TEINDS are not *debita fundi*, and so singular Successors are not liable in them; but yet the Minister has so far a tacit *Hypothick*, that he may exact his modified Stipend from any of the *Heritors*, as far as his Teinds will extend, reserving Relief to that distressed *Heritor*; and if the *Heritor* sell his Cropt, the Merchant who buys the same will be liable; but Tenants will not be liable, if they pay a joint Duty to their Master both for Stock and Teind.

19. WHEN the Tack of Tiends expires, the Titular needs not use a *Warning* against the Tacksman, as in Lands; but he raises and executes an *Inhibition* against the *Tacksman*, which interrupts *tacit Relocation* for that and all the subsequent Years, after which the *Intromitters* are liable to a Spuilzie.

Inhibition upon Teinds.

20. THE Parliament 1633, did, after the said Submissions and *Decreet Arbitral*, grant

Minister the Tithes of an Heritor pursuing a Sale, did by Act 83. ordain, That after Citation it shall not be in the Power of the Patron, Titular, or Tacksman, to make any Allocation of the Pursuer's Tithes solely, but only in Proportion to the other Tithes within the Parish, and within his Lordship principally where the Tithes of the Lands belonging in Property to the Patron, Titular, or Tacksman shall be free of any Part of that Allocation, if there be sufficiency of Tithes besides.

grant to His Majesty an *Annuity* out of all Teinds, except these paid to *Bishops*, to *Ministers* in Name of Stipend for serving the Cure, to Colleges, or Hospitals, and for other pious Uses, *viz.* Of every Teind Boll of the best *Wheat*, Ten Shillings; of every Boll of the best Teind *Bear*, Eight Shillings; and of every Boll of the best Teind *Oats*, *Meal*, *Pease* and *Rye*, Six Shillings: And where Oats are of that Nature, that they will not render above half Meal, the Rent to be Three Shillings; and where the Bolls of Victual are of inferior Goodness, Worth, and Price, than the best, that the King's *Annuity* shall be modified proportionally; and where the Rent doth not consist in Victual, but in Money, that the King shall have of every hundred Merks of *Parsonage* and *Vicarage Teind*, not consisting in Victual Rent, the Sum of Six Merks Money; and this *Annuity* is *debitum fundi* (*f*); but not being *annexed to the Crown*, it

Hen. 10. Annuities of Teinds

A&. 15. Par. 1633.

(*f*) This Statute is a Ratification of an Act of the General Commission of Tithes and Surrender, dated 20 May 1627, which we confess several other Articles of that Commission relating to the King's Annuity, which are worthy to be read, but are here omitted, because, by a Warrand from K. Ch. II. in the Year 1674, a Stop was put to further Payment (which Stop still continues) and at the same Time by Proclamation, all Arrears of this Annuity, before the Year 1660, were discharged. See my Lord *Stair*'s Institutions in the Title concerning Tithes.

it may be, and is ordinarily bought by the *Heritors* from *His Majesty's Thesaurer*, or others having *Right from the King* (*b*).

(*b*) It is very dubious, if the King's Annuity of Tithes be *debitum fundi*. Neither will the Analogy of Law allow it to be so; because, Tithes out of which it is paid, is *debitum fructuum*, to which no Person other than the Intrometter is liable. However, see in the Author's Observation on the Act cited, his Arguments for that Position.

TIT. XI.

Of Inhibitions.

PROPERTY and real Rights, with the Burdens affecting the same, being explained, it is fit now to treat of *legal Diligences*, by which these *Rights may be evicted*; or the *free Use and Disposal thereof restrained*; which *Diligences* are chiefly three, *Inhibition*, *Comprising*, and *Adjudication*.

Inhibition

2. INHIBITION, is a *personal Prohibition by Letters under the Signet, discharging the Party inhibited, to sell, dilapidate, or put away any of his Land, in Prejudice of the Debt due to the Raiser of the Inhibition*. The

Ground thereof

Ground and Warrand thereof is a Decreet, or a Registrate Bond, (which in the Construction

ſtruction of Law is a Decreet) either decerning or obliging the Debitor to pay or perform the Sums or Deeds therein ſpecified; or a depending Proceſs. And if theſe Inhibitions be not raiſed upon legal and relevant Grounds, they may be reduced (*a*). Tit.

Extent thereof.

3. INHIBITIONS reach only *Heritage*, but not *Moveables*; though the Stile thereof runs equally againſt both: *So that moveable Bonds* can only be reduced, in as far as they may be the Foundation of real Diligence to affect Heritage, reſerving ſtill perſonal Execution againſt the Granter; and they extend only to *poſterior voluntary Rights granted after Inhibition* (*b*); but not to *Apprizings*, or *Adjudications*, though led poſterior to the *Inhibition*, if the Ground thereof was anterior; neither do they extend to *poſterior Diſpoſitions* and *In-*

L

(*a*) Inhibition is validly raiſed on an Obligation, tho' neither regiſtred, nor made the Subject of a libelled Summons. And likewiſe, it is raiſed on a general Charge to enter Heir, provided the ſpecial Sum due by the deceaſt Debitor, with the Document, be mentioned in the Letters.

(*b*) Every Kind of Bond, whether moveable or heritable, without Infeftment, or with it, granted after executing Letters of Inhibition againſt the Debitor, are reducible, and will be found to be of no Force to affect the Subjects over which the Inhibition hath Influence.

Infeftments depending upon prior *Obligements*, either general or particular, for granting of these Rights; nor to *Renunciations of temporal Rights*, albeit posterior to the *Inhibition*, these being necessar upon Payment.

*Act of Sed. 19. Feb. 1680

4. By a late Act of *Sederunt**, *If the Creditor intimate by Way of Instrument to the Person having the Right of Reversion, that the Wadsetter or Annualrenter stands inhibit at his Instance, and does produce in presence of the Parties and Notar, the Inhibition duly registrated*; The Lords *will not sustain Renunciations, or Grants of Redemption, although upon true Payment, unless there be a Declarator of Redemption obtained, to which the Inhibiter must be cited.*

Manner of executing Inhibitions.

5. The Way of executing *Inhibitions* is, that the same must be by a Messenger against the Person inhibited, personally, or at his Dwelling-place, and at the Market-Cross of the Head Burgh of the Shire, Stewartry, or Regalities where the Person inhibited dwells*; and after *crying of three several O yes's*, and publick reading of the Letters, the whole Leiges are discharged to purchase any Lands or Heritages from the Person inhibited; and the Messenger leaves *and affixes a Copy of the Letters at the Market Cross*, all which must be written in a Paper, and subscribed by the Messenger, and by two Witnesses*; which Writ is called *The Execution of Inhibition*

*K. J. VI. Par. 15. Act 264. and 265. Par. 16. Act 13.

*K. C. II. Par. 3. Act 26.

hibition: And therefore the *Letters and Execution thereof must be registrated within forty Days after the Execution thereof* (c), either in the general Register at *Edinburgh*, or in the particular Register of the *Jurisdiction* where the Person inhibited dwells, or the major Part of the Lands ly †: And if any of these Acts be omitted, the *Inhibition* is null; these being *de solemnitatibus instrumenti*. Tit. 12.

† K. J. VI. Par. 7. Act 119.

(c) The Prescription of Inhibitions runs from the Date of the Registration of the Instrument of Sasine, on the Right granted contrary to the Inhibition, and not from the Date of the Registration of the Letters of Inhibition, with Executions.

TIT. XII.

Of Comprisings and Adjudications.

THE *Fee being thus settled in the Vassal*, it may be either taken from him, and evicted for his Debt, or his Crimes; the first is by *Apprising* and *Adjudication*, and the last by *Confiscation* and *Forfaulture*.

2. APPRISING proceeds by Letters charging the Debitor to compear before Apprising

a Meſſenger, (who is by the Letters made Judge and Sheriff in that Part, in Place of the *Sheriff of the Shire*, whoſe Office properly it is *) and to hear the Lands ſpecified in the Letters, appriſed by an *Inqueſt of fifteen ſworn Men*, and declared to belong to the *Creditor for Payment of his Debt*. But becauſe our Law thought it not juſt that a Man's Lands ſhould be taken from him, whilſt his Moveables could pay his Debt; therefore, in the firſt Place, the Meſſenger who executes the Letters, muſt declare, that he ſearched for Moveables; and becauſe he could not find as many as would pay the Debt; therefore he denounced the Lands to be appriſed on the *Ground of the Lands*, and at the *Market Croſs of the Shire, Stewartry*, or *Regality where the Lands ly, and left Copies both on the Ground, and at the Croſs*.

* K. J. VI. *Par* 5. *Act* 37.

3. At the Day appointed by the *Letters*, the *Meſſenger*, who is made *Sheirff* in that Part, *fences a Court*, and the *Debitor* being called, his *Lands are offered to him for the Money*; and if the Money be not ready, the *Inqueſt* finds, that the *Debitor's Lands ſhould belong to the Creditor for his Payment*, and this is called *a Decreet of Compriſing*; and the moſt part of the *Inqueſt affixes their Seals thereto*; upon which the *Compriſer* gets a *Charter* paſs'd in *Exchequer*, and is infeft by *Precepts out of the Chancellary*,

Decreet of Compriſing.

lary, if the Lands hold of the King: And though of old, Land appriſed was proportioned to the Money; yet thereafter, whatever Land was ſought to be appriſed, was accordingly appriſed, though far exceeding the Sum in value; becauſe ſeven Years was given (which was thereafter prorogated to Ten*) for *redeeming the Land by Payment of the true Sum*, and this is called a † *legal Reverſion*, becauſe the Law gives it to the *Debitor*; and if it be not redeemed within that Time, the Land belongs to *the Appriſer for ever*; but that *Legal* runs not againſt Minors, becauſe they want *Judgment to know their Hazard*; ſo that they may Redeem at any Time before they be twenty five Years compleat: But if the *Compriſing expire* during their *Minority*, the *Compriſer* will thereafter have Right to the whole Mails and Duties, albeit exceeding his Annualrent: But that Part of the Act is altered by a poſterior Statute, and the *Appriſer* is reſtricted to his Annualrent during the *Minorty of the Debitor* †.

Tit. 12.

* K. C. II. *Par.* 1. Seſſ. 1. Act 62.

† Legal Reverſion.

† K. C. II. *Par.* 1. Seſſ. 3. Act. 10.

4. If a Minor ſucceed to a Minor whoſe Lands are appriſed, he has Right to Redeem, as if the Comptiſing had been led againſt himſelf: But if a *Major* ſucceed to a *Minor* after the *Legal* is expired, he hath only Year and Day to Redeem; and if the ſeven Years be unexpired in the *Minor*'s Time, the *Major* may Redeem

See Book I. Tit. 7. § 12.

within these Years that are not run: And if the Rent of the Lands be not correspondent to the *Annualrent of the Money*, whoever has Right to the *Reversion*, whether *Major* or *Minor*, must satisfy the whole Sums and Annualrents resting, before he can Redeem †: But the *Compriser*, during the *Legal*, is restricted to the Annualrent of the Sums due to him, and the *Superplus of his Intromission* will be imputed in Payment of his Principal Sum; and if he be paid, by *Intromission* within the *Legal*, *of his whole principal Sum, bygone Annualrents and Expences*, with the *Composition paid to the Superior*, the *Comprising* expires *ipso facto* *.

† K. J. VI. Par. 23. Act 6.

* K. J. VI. Par. 21. Act 6.

5. THOUGH the *Superior* be not regularly obliged to receive a singular Successor; yet, lest by Collusion betwixt the *Debitor* and his *Superior*, the true *Creditor* should be unpaid; therefore by a special *Act of Parliament*, the *Superior* is forced to receive a Compriser upon Payment of a full Years Duty of the Land †, and he gets no more from all, though many *Comprisers* charge him to receive them; but if the *Superior* pleases, he may retain the Land to himself, he paying the Debt.

† K. J. V. Act 37. K. J. VI. Par. 23. Act 6.

6. THE first *Comprising* without *Sasine*, carries Right to all Tacks, Reversions, and other Rights which require no Infestment; and all posterior Comprisings need not Infestment, because they carry only the Right of Reversion; but yet ordinarily

second

second Appriſers do inſeſt themſelves, because the firſt may be null, or become paid (*d*); or the firſt Compriſer may ly out from ſeeking Mails and Duties; or the ſecond Compriſers would remove Tenants, which none can purſue without being inſeſt; but the *Superior* compriſing needs no Inſeſtment. Tit. 12.

7. After *Denunciation* of the Lands to be appriſed, the *Debitor* can do no voluntar Deed by diſponing or reſigning, (becauſe, elſe he might fruſtrate the Diligence) except he was, before Denunciation, ſpecially obliged to diſpone or reſign.

8. In a Competition amongſt Appriſers, the firſt Inſeſtment or Charge againſt the Superior is always preferred; and if the firſt Compriſer did Diligence to be inſeſt, but was ſtopt by *Colluſion*, as if the Superior, to gratify the ſecond *Compriſer*, ſhould unjuſtly ſuſpend the firſt, albeit the ſecond *Appriſer* be firſt inſeſt; yet the firſt *Appriſer* having done Diligence, by charging the *Superior*, will be preferred to the ſecond *Appriſer* firſt inſeſt. Preference amongſt Appriſers

(*d*) A ſecond, or any other poſterior Appriſer, needs not to be inſeſt, provided Inſeſtment has followed on the firſt Compriſing, for the Reaſon given by our Author.

9. The *Compriser*, during the Years of the *Legal*, is not obliged to enter to the Possession; but if he once enter, he must be comptable for the Mails and Duties, though he leave off to possess; but if the meaneſt Part of the Sum be unpayed after the expiring of the Legal, the whole *Land compriſed belongs to the Compriſer*, without Conſideration of what he has *intormetted with*; to prevent which, the *Debitor*, or a *ſecond*, or any *poſterior Compriſer*, who has compriſed the *Right of Reverſion*, does, before the Legal expire, require the *Compriſer* to compear at any Day or Place to receive his Money, in ſo far as he is not payed by his *Intromiſſion*; and having conſigned the ſame accordingly at that Day, he raiſes an *Action of Compt and Reckoning* before the *Lords of Seſſion*; and if it be found, *that he is paid by Intromiſſion, and the Money conſigned, the Lords decern the Compriſing to be paid and extinct*; nor needs the Debitor get *new Saſine*, for the former Right revives, ſince the Fee was ſtill in his Perſon, upon Condition that he would pay the Sum within the Legal.

Sheriff Fee.

10. In this *Compt and Reckoning*, the *Compriſer* will get allowance of the *Sheriff Fee* which is the twentieth Penny of the Sum that was compriſed for, and of the Entry payable to the Superior, though the *Appriſer* truly paid neither; but he will not

not get Payment of a *Factor's Fee* for tak- Tit. 12.
ing up the Rent, except he really paid it *(e)*.

II. ALL *Appriſings* led ſince the firſt of *January* 1652, within Year and Day *(f)* of the firſt *effectual Compriſing by Inſeftment*, or Charge againſt the *Superior*, come in *pari paſſu*, as if they were all contained in one *Appriſing*. But the *poſterior Appriſings* K. C. II. Par. 1. Act 62.

(e) An Adjudger gets Allowance, not only of the Entry, or Compoſition due to the Superior, with the Expence war'd out in deducing the Adjudication, and compleating the ſame by Inſeftment, but alſo of the Annualrent of both, from the Time they were expended.

(f) The Year and Day is computed from the Date of the Decreet of the Appriſing firſt compleated, and not from the Date of the Inſeftment; ſo that a poſterior Decreet of Compriſing, whoſe Date is not within Year and Day of the Date of the Decreet, which is perfected, tho' within Year and Day of the Date of the Inſeftment following on it, hath not the Privilege.

To prevent Diſputation on the Queſtion, which is the firſt Appriſing. By *Act* 62. *Parl.* 1661, it is declared, *That ſuch Compriſings as are preferable to all others, in Reſpect of the firſt and real Right and Inſeftment following thereon, or the firſt exact Diligence for obtaining the ſame, are, and ſhall be holden the firſt effectual Appriſing, tho' there be others in Date anterior.* See our Author's Obſervation on that Act.

It is a Conditional Right and Inſeftment, as is a Relief. See before Tit. 8. §. 18.

Book II. *prisings* within Year and Day, must pay their Proportion of the Expences of the *Infeftment*, and *Composition* given to the *Superior* by the first *Appriser* (g).

12. BECAUSE *appearand Heirs* did frequently acquire Rights to expired *Apprisings* against their Predecessors, by which they *bruiked their Estates without paying their Debt*, to the Ruin of *lawful Creditors*: Therefore our Law did very justly ordain all such Apprisings to be redeemed for the Sums truly paid out by the *appearand Heir* (b) which proceeds, albeit the *appearand Heir* acquire these Rights in his *Predecessor's Lifetime*. But if the expired Appriſing was acquired *Gratis* by

A& foresaid.

(g) By *Act* 62. P*arl.* 1661, it is provided, *That Creditors having Right to the first Comprising, shall, by the posterior Creditors offering to Redeem, be satisfied of the whole Expences deburſed by them, in deducing and expeding the first Comprising and Infeftment thereon, of which Expence, the first Appriser bears no Share.*

(b) The Laws, since our Author wrote this Book, have brought about great Alterations, for by *Act* 24 P*arl.* 1695. it is ordained, *That if an appearand Heir enter to poſſeſs his Father's Eſtate, or purchaſe to himſelf, or to any other for his Behoof, any Right thereto otherwiſe, as highest Offerer, without Colluſion, at a legal publick Roup of that Eſtate, his foreſaid Poſſeſſion or Purchaſe ſhall be repute a Behaviour as Heir, and a ſufficient paſſive Title to make him univerſally liable for all his Predeceſſors Debts and Deeds, as if he were ſerved Heir*, wherethrough such Debts are not to be now reckoned upon.

by the *appearand Heir*, the ſame is only redeemable by the Creditors for the Sums contain'd in the Appriſing. Tit. 12.

13. BECAUSE the Parliament thought it exorbitant to take the greateſt Eſtates for the ſmalleſt Sums, and to make a Meſſenger Judge in Affairs of ſo great Importance; therefore, in *Anno* 1672, this Way of Compriſing was altered, and in place thereof the Creditor now gets Land adjudged (*i*) to him by the *Lords of Seſſion*, proportionally to the Sums due to him with a fifth Part more, beſides the Compoſition due to the Superior, and Expences for obtaining Infeftment, becauſe the *Creditor* is obliged to take *Land for his Money* (*k*); Which *Adjudication* coming in place Adjudication

(*i*) As Sheriffs were, in ancient Times, competent Judges to Compriſings of Lands within their Territory; ſo at this Day, Adjudications of the ſame Lands, can validly be deduced before them, which, it may be thought, cannot be legally done before Magiſtrates of Burghs, tho' they have the Privilege and Power of Sheriffs within their Liberties.

(*k*) Through the Damage befalling the Debitor, by his giving Lands equivalent to the principal Debt, and to a fifth Part more, the firſt Alternative of the Act, is in deſuetude, and I doubt, if it can be inſtanced, that this Part was ever obſerved. Now, albeit an Adjudger may reaſonably judge his Debitor will not follow it; yet he muſt, in his Summons, libel upon the Act, and narrate diſtinctly both theſe Alternatives: other-

Book II. place of *Comprisings*, is Perfected by *Charter and Sasine*, as *Comprisings*; and the *Superior* is obliged to receive the *Adjudger**, but it is redeemable only within five Years by Majors.

*K. C. II. Par. 2. Sess. 3. Act 19.

14. If the *Debitor* compear not to concur for compleating the *Adjudger's Right*, by giving him a *Progress* and *Transumpts of the Evidents*, and ratifying the *Decreet of Adjudication* (*m*); then the whole Lands

otherwise his Decreet of Adjudication is null. And in the Case of *Geddie* against *Telfer*, *December* 9. 1681. obser. by President *Falconer*, The Lords found the Reasons of Reduction, that the Decreet of Adjudication being in absence, *i. e.* without Probation of the Rental, did bear a fifth Part more, relevant to retrench the principal Sum, Annualrents, and Composition to the Superior, without Accumulation of Annualrent upon Annualrent.

By *Act* 19. *Par.* 1672, The Lands are adjudgeable for the Annualrent of the Composition, and of the Expence.

A Creditor may, of an Infestment of Annualrent constitute in Favours of his Debitor, Adjudge a fifth Part more than his Credit, as if the same were Lands; for the Lords have found, that the Reason of the Act of Parliament extends to Annualrents as well as to Lands, *Jan.* 10. 1683. *Ker* against *Ruthven*, observed by *Falconer*.

(*m*) In Confirmation of the Notes above on § 13. *b.* the Lords, by a Decision, in a Plea of Adjudication, *Wilson* against Sir *Alexander Home*, *Feb.* 24. 1684. and by Act of *Sederunt* on the 26th

Lands can be *adjudged*, as they were formerly appriſed, (nor in that Caſe can the Adjudication contain a fifth Part more) it being unreaſonable to force a Man to take *proportional Lands for his Money*, and yet to be unſecured even for that *Proportion*; and they are redeemable within ten Years, (theſe *Adjudications* being now come in the Place of *Appriſings*) (*l*) and have the ſame Privileges and Reſtrictions which *Compriſings* had by the *Act of Parliament*, made concerning Debitor and Creditor, in *Anno* 1661. But if the Creditor attain Poſſeſſion upon his Compriſing, or Adjudication, he can uſe no further Execution againſt the Debitor, except the Lands be evicted*. Tit. 12.

15. THERE are other two Kinds of *Adjudication* †, allowed by our Law; The firſt is, when the *apparent Heir of the Debitor*,

* K. C. II. *Par.* 2. Seſſ. 3. A. 19.

† Adjudications after the old Form.

26th of that Month, declare all Adjudications, led after that Day, not only for the Penalty, but alſo for a fifth Part of the Principal, to be null.

(*l*) Adjudications have Privileges the ſame almoſt with Appriſings, in as far as a Citation given upon a Summons of Adjudication, makes the Decreet of Adjudication preferable to an Infeftment of Annualrent, conſtitute after that Citation, tho' before the ſaid Decreet was pronounced, *Jan.* 2. 1682. Creditors of *Enoch*, obſerved by *Falconer*. But this Preference holds only in Competition with voluntary Rights, and not in Competition with legal Diligences, ſuch as Arreſtments, *Anderſon* againſt *Anderſon*, *Feb.* 1. 1684. obſerved by *Falconer*.

bitor is charged to enter Heir; and renounces to be Heir, the Creditor having obtained a Decreet, *Cognitionis Causa* for constituting the Debt, wherein the apparent Heir is only pursued for *Formality*: But the Decreet can have no Effect personally against him; in which Case, the

By Act of *Sederunt*, *Nov.* 23. 1711. Factors upon bankrupted Estates are authorized to raise a Summons of Adjudication at their own Instance, to the Behoof of such Creditors who shall, within 40 Days after Sequestration, give to a Clerk of Session their Instructions of Debt, with a Declaration, *&c.* The Expence of such Adjudication, if the first Time raised, comes off the Estate, but the Charges of a second, or After-Summons, must be paid by the Creditors themselves; and all this is without Prejudice to each Creditor by himself alone, to adjudge as formerly: However, on Account of some Inconveniency, and that bankrupted Estates are adjudged before Sequestration, this Act is not observed.

Of all Decreets of Adjudication, as well of these called *cognitionis causa*, and *ad factum præstandum*, as of these which by Act of Parliament 1672. have come in Place of Apprisings, the Clerk is ordered to make an Abbreviate, *i. e.* a short Note of the Contents thereof (which is come in place of Allowances) to be signed by the Lord Ordinary who pronounced Decreet, and it must, within 60 Days, be recorded in the Books of the Clerks to the Bills. See *Act.* 24. *Regul.* 1695. *Act.* 4. *Regul.* 1696. *Act of Sed.* Jan. 18. 1715. Before this Regulation, Adjudications on Decreets *cognitionis causa*, not Adjudications *ad factum præstandum*, were neither allowed, nor recorded.

the *Hæreditas jacens* will be adjudged to the Creditor for Payment of the Debt due by the Defunct; which if it be liquid, and inſtantly inſtructed, the Purſuer in the ſame Proceſs proteſting for *Adjudication*, the ſame will be allowed to him ſummarily, without Neceſſity of any other Decreet, *Cognitionis Cauſa*. Tit. 12.

Legal Rever. of Adjud.

16. THESE *Adjudications* are redeemable within *ten Years*, at the Inſtance of *Con-creditors*, one after another, who have likewiſe obtained Decreets of *Adjudication*: And a Minor renouncing to be Heir, may be reponed, and allowed to *redeem upon Payment**. But Majors renouncing have not that Privilege directly, (*o*) it being only by Act of Parliament granted to *Minors*, or to *Co-creditors*, likewiſe Adjudgers.

* K. C. II. *Par.* 1. Seſſ. 1. Act 62.

17. AND if the *Superior* be charged to infeft the *Adjudger*, he will get a Years Rent for *Compoſition*, as in *Compriſings*†(*p*).

† K. C. II. *Par.* 2. Seſſ. 1. Act 18.

18. AD-

(*o*) A Major renouncing, &c. uſes this Method to be redreſſed; he grants a ſimulate Bond to a Confident, who charged him to enter Heir in Special to the *Hereditas jacens*, within 30 Days, and thereafter raiſes Adjudication in common Form, which ſerves him for a Title, not only to redeem prior Adjudications, but alſo to reduce them upon Nullities, and in a Proceſs of Mails and Duties, upon a Competition, to alledge and prove the anterior Adjudger paid by Intromiſſion, &c.

(*p*) Every Adjudger whatever pays a Years Rent;

Book II. 18. ADJUDICATIONS carry Right to all which would have fallen to the Heir, as all heritable Rights (*q*); and the whole bygone Rents and Duties, ſince the Defunct's Death, may be *adjudged*, becauſe theſe belonged to the Heir.

19. THERE is another Kind of *Adjudication* competent by our Law; that is for performing any Obligement which conſiſts *in facto*, and relates to particular *Diſpoſitions* and *Obligements to infeft*; and after Diligence uſed by Decreet, and *regiſtrated Horning* againſt the Diſponer or his Heir, for making the ſame effectual, the Lords will *adjudge the Lands diſponed to belong to the Purſuer* as a *Remedium extraordinarium*, there being no other Remedy competent (*r*).

20. THIS *Adjudication* extends no further than to the Thing diſponed, and hath no *Reverſion*.

21. IF

(*q*) Heirſhip Moveables, and Bonds ſecluding Executors, are adjudgable, tho' ſometimes they are carried off by an Executor confirming, and in a Competition, there's place for the Rule, *prior tempore potior jure*.

(*r*) An Adjudger of ſpecifick Lands in Implement of a Diſpoſition of theſe Lands, being firſt infeft, excludes other Adjudgers for liquid Sums, tho' within Year and Day. For, in this Caſe, the *Act* 62. *Parl.* 1661. which brings in *per-peſſion* Apprizings for liquid Sums deduced within Year and Day of one another, takes not place. See *Lady Fraſer* againſt the Creditors of Lord *Fraſer*, *Decemb.* 12. 1667. obſerved by *Stair's*.

21. If the common Debitor become Bankrupt, and that there are real Diligences affecting his Eſtate, then the Creditors may raiſe an Action of Sale before the Lords, and get the Eſtate rouped †, and, according to their Diligences, the Price divided amongſt them, effeiring to their Sums. Tit. 12. †K. C. II. Par. 3. Act 17.

22. In this Proceſs, the Lords firſt determine what ſhall be the loweſt Price, and then they name one of their Number (*a*)

(*a*) The Law in this Point is much altered to the better; for now by *Act* 20. *Par. July* 1690. The Lords of Seſſion are authoriſed to pronounce Decreet of Sale of Bankrupt Eſtates, adjudging to the Buyer the Lands ſold, in which he may be inſeft in the ſame Way as upon other Adjudications. 2. That ſo ſoon as the Debitor is found Bankrupt, the Sale may proceed, whether the Legal be expired or not. 3. If none will buy at the Rate determined by the Lords, the ſaid Lords are impowered to divide the Lands among the Creditors, according to their Rights and Diligences. 4. That the Sale may not be obſtructed by the Donatary of Liferent Eſcheat, the Lords are to determine the Value of it, and to ſell Lands for paying the Price thereof.

In Relation to this Act, it may be obſerved, That a Decreet of Sale is a new Kind of Adjudication, and is without Reverſion. 2. Tho' the Matter of Bankruptcy be fully treated by our Author in his Obſervations, on *Act* 18. *Par.* 1621. yet the Definition and Deſcription of a Bankrupt not being clear and diſtinct, gave riſe to much Altercation, till the Parliament by *Act* 5. *Anno* 1696, ſtatuted, *That for thereafter, if any per-*

before whom the Roup is to be made; and, if none offer more, the Raiser of the Action is preferred, and the Lands are disponed by that Lord, and the Disposition runs in his Name.

CONFIS-

Person under Diligence by Horning and Caption be either imprisoned, or retired to the Abbey, or any other privileged Place, or flee or abscond for his personal Security, or defend his Person by Force, and be afterwards found by Sentence of the Lords of Session to be Insolvent, shall be holden and repute on these three joint Grounds, viz. *Diligence by Horning and Caption, and Insolvency, joined with one or other of the said Alternatives of Imprisonment, or retiring, or fleeing, or absconding, or forcible defending, to be a notour Bankrupt, and that from the Time of his foresaid Imprisonment, retiring, flying, absconding, or forcible defending.*

Executions on edictal Citations of all interested in the Lands, &c. as by *Act* 17. *Par.* 1681, are ordered to be summoned, must be recorded in a Particular Register at *Edinburgh*, upon the last Day to which these Citations are given, otherwise they are null, *Act of Sed. Nov.* 13. 1711, § 1.

By *Act.* 26. *Regul.* 1695. The Sale cannot proceed, till the Decreet of Ranking of the Creditors be extracted.

The Division of the bankrupted Lands among many Creditors, (when some of them have small Debts) being most difficult, if not impracticable, as was found in the Case of the Creditors of *Bruce* of *Kennet*, in the Year , the Lords for to invite Persons to offer at the Roup, upon Application of the Creditors, will abate the

23. CONFISCTION will be handled in the Title of Crimes. Tit. 12.

the Price, and ordain a second Roup for selling the Lands according thereto. See the Case of the Creditors of Ilkend Supplicants July 7. 1709. marked by Forbes in his Journal of the Session.

Let this suffice, seeing the Form and Order of a Process of Sale, &c. from the Commencement to the Conclusion thereof belongs to the Practical Part of the Law, and was not within our Author's Scheme and Design in these Institutions.

H

THE INSTITUTIONS Of the LAW of SCOTLAND.

BOOK III.

TITLE I.

Of Obligations and Contracts in general.

HAVING thus cleared *Real Rights*, we will now proceed to treat of *Obligations and Personal Rights.*

Obligations.

2. AN *Obligation is defined to be that legal Tye whereby we are bound to pay or perform any Thing.*

Division of Obligations.

3. THE chief *Division* of *Obligations* by the *Civil Law* and ours, is, that some are

re *Natural*, because they arise from the Principles of right *Reason*, or *Laws of Nature*. Some *Civil*, because they arise from *positive Laws*, or *Municipal Customs*.

Another Division of Oblig.

4. ANOTHER considerable *Division of Obligations*, is, That some arise from *Contracts*, some from *Deeds* resembling *Contracts*, some from *Malefices*, and some from *Deeds* which resemble *Malefices*; *ex contractu, aut quasi Contractu; ex maleficio, aut quasi maleficio*: For we become equally tied and obliged to *Men*, either by *contracting expressly* with them, or by doing some Deed which induces an *Obligation* without an *express Paction*, or by committing *Malefices* against them.

Contracts.

5. A *Contract is an Agreement entered into by several Persons, inducing an Obligation by its own Nature; and the Obligations arising from Contracts* are divided and distinguished according as they are perfected, either by the sole Consent of the *Contractors*, or by the Intervention, or Tradition of Things: Or lastly, By *Word* or *Writ*. Hence is that remarkable Division of *Contracts* in the *Civil Law*, *Qui re, verbis, literis, aut consensu perficiuntur*.

Real Contracts

6. THE *Contracts* which depend upon Things, are these, which arise either from *Borrowing*, (which comprehends *indebitum solutum*) or from *Loan*, or from *Depositation*, or from *Impignoration*; and are called *mutuum, commodatum, depositum, & pignus*.

Mutuum.

7. BORROWING, or Mutuum, is *that Contract, whereby a Man getting any Thing from another, is obliged to restore him not the same Thing that was borrowed, but the Equivalent; or, as much of the same Quality in Measure, Number, and Weight*; As, when one borrows a *Thousand Pounds*, the *Receiver* obliges himself to restore not the same, but another *Thousand Pounds*; and therefore, the *Property of the Thing borrowed*, being transferred from the *Giver* to the *Receiver*, the *Receiver* runs the Hazard of all the Loss that the Thing borrowed can sustain, after it is delivered: This Contract is most strictly interpreted, so that nothing is understood, but what is clearly express'd.

Commodatum.

8. LOAN, or *Commodatum*, is that *Contract*, whereby a Man *gets the Loan of any particular Thing* gratis, *for some special Use, and obliges him to restore the same Thing* in Specie, *and not the Equivalent*; as, when a Man gets the *Loan* of a *Horse*, or *Coach*: And, because in this Case the *Property* remains with the *Lender*, therefore, if the Thing lent be lost, or perish by Chance, the Loss redounds to the *Lender*; for the Thing is still his: But, if the Thing be lent merely for the Advantage of the *Borrower*, he is liable to do most exact Diligence; and therefore, if the Thing perish, or sustain any Prejudice for Want of exact Diligence, the *Borrower* must make up the same;

same; but, if the Thing was lent for both Tit. 10
the *Borrower* and the *Lender's Advantage*, (~~~)
then, from the same Principle *of natural Equity*, the *Borrower* is only obliged to do such Diligence, and to be so careful of the Thing *borrowed*, as he would have been of his own.

9. In this *Contract*, the *Receiver* is obliged to restore the same *Species* in as good Condition as he got it (*a*); and the *Lender* is obliged to pay the *Receiver* any considerable Expences, that he necessarily bestowed upon the Thing *borrowed* (*b*), the *Law* not allowing *inconsiderable Expences*; because the *Borrower* has the Use of the Thing which should compense these.

10. Precarium is, *when any Thing is lent to be called back at the Lender's Pleasure, wherein it differs from* commodatum; which Precarium.

(*a*) Lawyers express themselves in the Terms of Philosophy, *Genus* & *Species*, but in a Meaning quite different; for *Genus* signifies, in Law, the same Thing as *Species* in Logick: And again, *Species*, in the Language of the Laws, signifies the same, as *Individuum* in Philosophy. Wherefore, a Commodatary must restore the Thing borrowed, (the very same Individual or) in *Specie*, and not another *Genuinum*, and in its Kind, or an Equivalent.

(*b*) If the Expence waged on the Thing borrowed be considerable, the Commodatary may either retain it till he be paid; or, having delivered it under a Protestation, may raise Action for Payment.

imports always a *determinate Time* for making Use of the Thing lent.

Depositation. 11. DEPOSITATION is that *Contract*, which is entered into, by one Man's *delivering any Thing into the Custody of another, to be kept* gratis for his *Use*; and therefore, because, in this *Contract*, the *Property remains* with him, who did *depositate the Thing*, if it be lost, it is lost to him: And, since *Depositations* are made for the *Behoof of him* who does *depositate*, therefore the *Depositar* (for so we call him, in whose Hand the Thing is *depositated*) is only liable, if the *Thing depositate* was lost by the *Depositar's* Dole, or *gross Fault*; *nam depositarius tantum præstat dolum, & latam culpam*: But *Inn-keepers, Stablers*, and *Masters of Ships*, are liable to most exact Diligence; in *preserving the Goods of Travellers* and *Passengers*, which they bring into their Houses and Ships, and to repair and make up all the Loss they may sustain, while they are in the *Inns* or *Ships*, whether the Prejudice come by the *Servants* or *Mariners*, or by *Strangers*; which special Kind of *Depositation*, is *introduced by Equity, contrary* to the *common Rules* of *Depositation*, and which we have immediately from the *Civil Law*, and *edictum prætoris*, intituled, *Nautæ, caupones, stabularii*, &c.

Nautæ, caupones, Stab. &c.

12. As, in this *Contract*, the *Depositar* is liable to restore the same Thing that is *depositate*, and not the *Equivalent*; so he, who

who *depositates*, is obliged to pay the *Depositar* what he beſtowed upon it, whilſt it did ly beſide him (*c*); for, generally, a *gratuitous Office* ought to prejudge no Man. But he cannot crave *Compenſation* upon any Debt due to him, by the Perſon who *depoſitates*, which is *ſingular in this Contract*, for he muſt firſt anſwer his Truſt. Tit. 2

13. PLEDGE is the *Contract*, whereby *one Man gives to another any Thing, for the Receiver's Security of what he owes him, to be redelivered upon Payment*; and therefore, becauſe the Thing it ſelf, *in Specie*, is to be redelivered, if it periſh, during the *Impignoration*, without the groſs Fault or Fraud of him who receives the Pledge, it periſhs to the *Impignorator*; and, becauſe *Impignorations* are made for the Advantage of the Giver and Receiver, (the one being concerned to get Money, or ſome ſuch Thing upon the Pledge, and the other to get a Pledge for Security of his Money) therefore, he who receives the Pledge, is liable to do ſuch Diligence for preſerving thereof, as prudent Men uſe to do in their own Affairs; but he is not liable for *culpa leviſſima*, the Contract being for the Behoof of both Parties; and he will have *Repetition* from him Pledge.

(*c*) Nevertheleſs he may retain it, till he get Satisfaction of what he has neceſſarily or profitably beſtowed on the Thing depoſited: And in this we adopt the *Roman* Law.

him, for what he profitably bestowed upon it during the *Impignoration*.

Hypotheque.

14. Sometime what is *impignorated* is not delivered, and then the Pledge is called an *Hypotheque*, and the Law sometimes makes such *tacit Hypotheques* without *express Paction*, as, where it makes the Corn growing upon Land, or the Goods brought into the House, to be liable to the *Heritor* for Payment of his Rent.

Solutio indebiti.

15. If one Man pays to another more than is due to him, or what is not due at all, the Law allows to him *Repetition* of what was unjustly paid; and this is called *Solutio indebiti*; because, by *paying* to you, I oblige you *really*, and *in Effect* to repay what shall be found not to be *due*, or to have been *paid* more than was *really* due: But, since this Obligation arises from the Payer's Ignorance, therefore, if he knew that what he paid was not due, he will not get *Repetition*; but, what he paid, will be look'd upon as a *Donation*, but it must be *ignorantia facti*, for *ignorantia juris* availeth no Man: And, since this Repayment is only allowed by the *Principles of natural Equity*; therefore, if what was paid was due in *Equity*, though it was not due by *positive Law*, the Payer will not get *Repetition*.

TIT.

TIT. II.

Of Obligations by Word or Writ.

SOME *Obligations* require *Writ* to make them *binding*, whereas others require *Writ* only by Way of *Probation*; that is to say, *cannot be proven without Writ, though they be valid, and binding without it.* Obligation by Writ.

2. ALL *Obligations* for *transmitting the real Right of Lands*, or others to be perfected by Writ, do so far require *Writ* of their own Nature, that though the Bargain be solemnly and clearly ended by *verbal Transaction*, yet there is still Place to *resile*, or *locus pœnitentiæ*, till the *Writ be signed* (a).

3. THOUGH *verbal Promises* do by our Promises. Law bind the *Promiser*, yet because the *Position* and *Import* of Words may be easily mistaken by the *Hearers*; therefore, *verbal Obligations* or *Promises* can only be proven by *Oath of Party*, and not by *Witnesses*, though the Sum be never so *small*.

4. BECAUSE

(a) By a *British* Act of Parliament made in the 10th Year of the Reign of Queen *Anne*, and *Anno Dom.* 1711. *Cap.* 19. And by another in the 12th Year of her Reign, *The Writs named in these Acts must be extended in stamped Paper, otherwise they are neither obligatory nor probative, unless* 5 lib. *be paid.* The Titles of the Writings to be put on stamped Paper, may be found in the End of *Spotiswood's Introduction to Stiles*, &c. Edit. *Anno* 1715.

4. BECAUSE *Mens Subscriptions* may be easily *counterfeited*; therefore, by an *express Statute* with *us*, no Writ of Importance (which we interpret to be, when it is granted for more than 100 *lib.*) is valid; except it be signed *in Presence of two subscribing Witnesses*, if the Party can write; or, by two *Notaries* and four *Witnesses*, if the Party cannot write * (*b*); except the Writ be *holograph*; that is to say all written with the Granter's own Hand, and that the *Writer* and *Witnesses* be *specially designed*†; And though the *subscribing* by two *initial Letters* be sustained, where it is proved, that the *Subscriber* was in Use so to *subscribe* (*c*); yet the *Granter*'s Mark is not sufficient, except the Verity of the affixing that Mark be referred to the *Granter's Oath*. And,

* K. J. VI. Par. 13. Act 175.

† K. C. II. Par. 3. Act 5.

(*b*) For clearing the Doctrine in this Section, it is fit to read the Acts cited, with our Author's Observations on them.

With Respect to Notars, the Lords, by Act of *Sederunt*, *July* 21. 1688. "Discharged them to "subscribe Writs for Persons, who cannot write, "unless it either consist with the Notar's Know-"ledge, that he, for whom, and at whose Com-"mand they subscribe, is the Person designed in "the Writ; or that the same may be attested by "these, who subscribe Witnesses to the Notar's "Subscription, or by other credible Persons; "and, which the Notar is to mention, when he "subscribes for the Party.

(*c*) By a very late Decision, neither signing by initial Letters, nor by Marks, are sustained in Writings of Importance.

And, if the Sum, though exceeding 100 *lib.* be restricted to an 100 *lib.* the Obligation will be sustained, though it want Witnesses. Tit. 2.

5. Such is the *Favour of Commerce*, and such *Expedition* it requires, that, upon its *Account*, *Bills of Exchange* are sustained (*d*) though they be not signed before *Witnesses*; and *Delivery of Goods* upon *Bargains* are sustained to be proven by *Witnesses*, though there be no Writ, there being no Writ used in such Cases. And such is the *Favour of Contracts of Marriage*, especially, where they are become *notour* by *subsequent Marriage*; that they are sustained, though there be no *Witnesses*. Bills of Exchange.

6. By *our Law*, an *Obligation* in Writ is not binding, except it either be *delivered*, or dispense with the not Delivery, by a special *Clause* therein, *nam traditione transferuntur rerum dominia*: But *Tradition* is not requisite in *mutual Contracts*, or, where the Granter has an Interest to keep the Paper himself, as where his Liferent or Liberty to alter is reserved; and, if the Writ be in his Hand, in whose Favours it was made, it is presumed to have been delivered, and cannot be taken from him upon the Pretence of *not Delivery*; except it be referred to his Oath, that it was never a delivered Evident by the *Granter*. Delivery of Writs.

T I T.

(*d*) See *Forbes's Treatise on Bills of Exchange*.

TIT. III.

Of Obligations and Contracts arising from Consent, and accessory Obligations.

Contracts perfected by Consent.

THOUGH all *Contracts* require the Consent of the *Contractors*, yet there are four, *viz. Emption*, *Location*, *Society*, and *Mandate*, which are said in a more special Way to arise from Consent; because these Contracts are perfected by mere *Consent of Parties*, without any farther Solemnity, or Tradition: And thus, how soon two Parties agree concerning the Price of any thing that is to be sold, that *Contract* is by mere Consent so far perfected, that he hath the Seller precisely obliged to deliver the Thing bought, and perfect the Sale; albeit the *Dominium* or Property be not transferred, but remains with the Seller, until Delivery; And, if the Thing bought perish without the Seller's Fault, even before Delivery, the Loss is the Buyer's, in Respect of the personal Obligement upon the Seller to deliver it, and the *Buyer's Right is stablished* even before *Tradition*; and though *Earnest* or *Arles* be given as a *Symbol* or *Mark* of *Agreement*, yet the Consent without the *Earnest* or *Arles* (as we call it) completes the *Bargain*; and, if the *Earnest* be in *current Money*, it is to be imputed as a *Part of the Price*.

Eth. & Veal.

Earnest.

2 In

2. In this *Contract of Emption* and *Vendition*, there must be a Price consisting in *Money*; for, if one thing be given for another, the Law calls that *Contract*, *Permutation* or *Excambion*, and not *Emption* and *Vendition*: And this Price must be certain and definite; and, if the Price be referred to another, the Bargain will subsist, except that third Party to whom it was referred, either will not, or cannot determine the Price. Tit. 9.

3. Location and *Conduction* is a *Contract, whereby a Hire is given for the Use and Profit of any Thing, or for the Work of Persons.* It differeth from *Emption* and *Vendition* chiefly in this, that the Design of the *Contract* is to *transfer* the Property, but in *Location* the Property remains with the *Setter.* Location and Conduction.

4. This *Contract* being entered into by the *mutual Consent*, and for the Advantage of both Parties, the Conductor is only liable to use and exhibit a moderate Diligence, for preserving the Thing let; that is, such *Diligence as prudent Men exhibit in their own Affairs*; so that, if the same perish without his *gross and supine Negligence* or *Fraud*, he is not liable to make it up to the *Locator*.

Location for setting of Lands for a certain Hire, (called the *Tack-duty*) is frequent in *Scotland*; and it is to be observed, that if the *Ground yield no Increase*, but is absolutely *barren*, without the Fault of Tack-Duty.

of the Conductor, the Hire will not be due, since that was given for the *Profit* and *Use* of the Ground: But, if there be not an *absolute Sterility*, and that the Land yield some Profit, though never so little, the Hire will be due, if the Profit but exceed the Expence of the Labouring.

6. From this *Contract* there arise *two Actions*; the one whereby the *Conductor* is obliged to pay the Hire agreed unto, and to restore the Thing set after the End of the *Location*, in as good Condition as he got it. The other is an Action, whereby the *Locator* is bound to refund to the *Conductor* the necessary Expences imployed upon the thing hired, during the *Location*, *Vide supra*; *Book II. Title VI.* §§ 5, 6, 7, 8, 11.

Society. 7. Society is a *Contract*, whereby several Persons oblige themselves to *communicate Loss and Gain arising from the Things common in the Society.*

8. All the *Partners* in the *Society* do, by the *Nature of this Contract*, share *equally*, except it be otherwise *provided*; and, if either the Share of the *Gain* or *Loss* be expressed, the one *regulates* still the other: But, because some *Mens Pains* are of as great *Value*, as other *Mens Money*; therefore it is lawful and consistent with the *Nature of Society* to contract so, as that one may have the *Half of the Gain*, and no *Loss*: But the *Contract* would be null, if it were

were provided, *that one should have all the Gain, and no Loss*; for there could be no *Compensation*, though the other were never so skilful. Tit. 3.

9. By this *Contract*, all the *Partners* are obliged to *advance* for the *Affairs of the Society*, according to the Shares they have in it.

10. The *Society* is *extinguished*, and the *Persons* who entered therein *loosed* therefrom, by the Death of any of the *Partners*, or by their becoming *insolvent*, except it be otherwise provided; for this is a personal *Contract*, wherein Men respect the Humour and Industry of one another, and so this Contract is dissolved by the *simple Renunciation* of any of the Partners; so that every one has a *Negative Vote*, and, if the Society be entered into with this Condition, *that it should not be dissolved at the Option of any of the Partners, the Law does reprobate such Pactions*: And, from the same Principle, likewise it is, that *Partners* in a *Society*, are not liable *for farther Diligence*, than they used to *adhibit* in their own Affairs, having *voluntarily choosed* one another for *Partners*; for it is presumed, they are *satisfied* with one another's *Diligence*, the *Contract* being entered into for the *Behoof and Profit* of all the *Partners*. Ways of Dissolution of Society.

11. Mandate is that *Contract*, where *one imploys another to do*, or *manage any Business gratuitously*; for, if he who is *implayed* Mandate.

Book II. Paper a Receiver, it is not properly a Mandate, but *Locatio operarum*, or a *hiring of the Person* so employed; but yet, if the Receiver of the *Mandate* has been at any *Expence* upon the *Account* of the *Mandate*, the *Employer* must pay it.

12. He who receives the *Mandate* is obliged to *execute the same*, according to the *Rules prescribed* by the *Employer*, and not to exceed the Bounds of his *Mandate*: And therefore, if *Titius* employed *Seius* to buy him such a particular Piece of Land for 10000 *lib.* *Titius* is obliged to *ratify his Bargain*, though he buy it for 9000 *lib.* because *Ten* comprehends *Nine*; but, if he pay 12000 *lib.* for it, he is not obliged to ratify the Bargain, because he exceeds the Bounds of his Commission.

13. Mandates expire, either by the *Revocation* of the Employer, if the Thing or Business in which he was employed be entire; or, by the Death either of the Person employed, or of the Employer (*a*); or by *Renunciation* of the Person employed: But in all those Cases, if the *Thing undertaken* be not entire, the Person employed, or his *Heir*, may, and must proceed to *execute the Mandate*, notwithstanding of the *Revocation*, *Death*, or *Renunciation*. *Mandatars* are

(*a*) The Position in this Section takes Place only in Mandates given to serve the Interest of the Mandant; whereas, if granted for the Behoof

are liable for *exact Diligence*, & *culpa levissima*; because, albeit the *Mandate* be only *gratia Mandanti*, yet the *very Nature* of it implies *Diligence*. The 9th Diligence of Mandatars.

14. MANDATES are either *express*, *arising* from *express Consent*; or *tacit*, which are inferred by *Signs and Taciturnity*: As for Instance, if a *Person present* suffers another to *act in his Affairs*, he is understood to give him thereby a *tacit Mandate*. Div. of Mandates.

15. SECUNDO, *Mandates* are either *General*, *for managing all Affairs*; or *Special*, for doing some *particular Business*, conform to the *precise Tenor* of the *Commission*: And, albeit *general Mandates* contain most ample Power of *Administration*; yet, they are not extended to *committing of Crimes*: Or, *Secundo*, To Donations, albeit, where there is any probable Cause, *Gratifications* may be allowed, which will be regulated *secundum arbitrium boni viri*; this being *contractus bonæ fidei*, which implies *exuberant Trust*. Gen. and Special Mandates.

16. TERTIO, No *general Mandate* will imply a Power to *alienate Immoveables*; or

hoof of a third Party, *viz.* to perfect a Deed of Conveyance made by the Mandant to him, it cannot be revoked; and, tho' formerly, the Death of the Mandant did extinguish such Mandates, yet now it is not so; for, by *Act 21, Parl. 1693.* it is declared, *That Procuratories of Resignation, and Precepts of Sasine, shall continue in full Force, as well after the Death of the Granter, as before.*

to submit or transact any *litigious Business* (*b*).

17. QUARTO, If, in the general *Mandate*, some special Cases are express'd, it will not be extended to Cases of greater Importance than those express'd.

18. THE great *Favour of Commerce* has introduced another Kind of *tacit Mandate*, by which *Exercitors of Ships*, and *Propositors* are obliged by the Contracts of the *Masters of the Ships*, and of the *Institors*, in Relation to the Ships and Voyages; or to the particular *Negociations*, wherein they are intrusted.

19. EXERCITOR is he, to whom the Profit of a Ship doth belong, whether he be the *Owner*, or hath only *freighted the Ship*; the *Master* is the Person intrusted with the *Charge of the Ship*, who has Power to oblige the *Exercitor*, by *contracting for the Reparation and Out-rigging of the Ship*, and in Matters relating to the *Voyage*.

Exercitor.

20. INSTITORS are intrusted with *particular Negotiations at Land*, such as keeping of Shops, *&c.* and they oblige their *Propositors*, in Relation to the Affair wherein they are intrusted, as *Exercitors* are in *Maritime Affairs*.

Institor.

21. NEI-

(*b*) A general Mandate impowers not the Mandatary to serve his Mandant Heir in general, or in special, to a deceased Ancestor, because of the Hazard that may ensue, lest the Inheritance bring Burden in Place of Benefit.

Tit. 3.

21. NEITHER the *Master* of Ships, nor *Institors*, need shew their *Commission*, but their being in the *Office* is sufficient to oblige the *Exercitors* and *Constituents*. And, if there be many *Exercitors*, the *Master's Contract* obliges them all in *Solidum*, albeit, what was borrowed be not employed for the Use of the Ship; only, it must be known to the *Lender*, that the Ship stood in Need of such Reparations: And the Facts of the *Institors* will oblige their *Constituents* of whatsoever *Sex* or *Age* they be; and even though they be *Pupils*, *Minors*, or *Wives*, who cannot *validly oblige themselves*; for they have themselves to blame, who intrusted such Persons.

22. As all those *Obligations* and *Contracts* arise from *express Consent*, so others arise from *tacit Consent*, such as *Homologation*: As for Instance, though a Man be not obliged by a Bond granted in *Minority*; yet, if he pay a Part of it, or *Annualrent* for it, after he is *Major*; the *Obligation* is thereby *homologated*, or *owned*, and becomes *valid*, not from the Time of the *Homologation*, but from the Date of the *Writ* (*c*): And therefore, it is fit that such as design not

Homologation.

(*c*) In Homologation, the Deed homologating, consequentially, touches the other imperfect Obligation; as to which, the Consent in Homologation is indirect, tho express, with Respect to the Act homologating, but not with Respect to that homologated.

...nor undue under invalid Deeds, should refrain from doing any Thing that may infer an Imputation of them; but because Bona fides is dubia semper, therefore it should not be proven by Witnesses.

Quasi Contractus. Negotiorum Gestio.

3. All Obligations cannot be bound up under general and regular Names of Contracts; therefore the Law allows some Obligations to pass under the Name of Quasi Contractus, because they have the Resemblance, and carry of the Nature of Contracts; and these are Negotiorum Gestio, whereby, if any Person manage your Business advantageously for you, you are liable to him for his Expences, though you gave him no Mandate, lest such as are absent should be prejudged by the Negligence of their Friends, and their Averseness to meddle with other Peoples Affairs, where they should have nothing allowed them for their Expences. As the Manager is liable to refound to the Person whose Affairs he managed, any Prejudice done to him since, else any Man might be inticed officiously to meddle in another Man's Affairs to his Disadvantage; but this is to be understood, si minus utiliter gesserit. Otherwise, if he acted profitably, albeit the Event do not succeed, he will get his Expences.

Tutory.

4. The other Quasi Contractus, are Tutory, Communion of Goods, entring Heir, the Obligation of Repayment, that arises upon Payment of what is not due. For, if one be

be Tutor to you, he enters in a Kind of Tacit Contract with you, whereby he is bound to administrate your Affairs, and you are bound to pay him his Expence. But of all these, I have treated elsewhere in their proper Places, as I shall do of *Malefices*, and what resembles them, when I come to treat of Crimes, of which these may be properly said to be Branches.

25. HAVING thus treated of *Principal Obligations*, the only *Accessory Obligation* that I need mention is *Cautionry*, whereby one Man becomes *Surety for another*, either to pay a Sum, or perform a Deed *; betwixt which two there is this Difference, that these that are Cautioners for a Sum, if they be bound conjunctly and severally with the principal Debitors, may be pursued, without pursuing the Principal; And *quoad* the Creditor they are Principals; Cautioners.

(*) Different Reading of the 25. from the 5. Line. Between which Two there is no difference, unless the Cautioners for a Sum are bound conjunctly and severally with the principal Debitors, for in that Case they may be pursued without pursuing the Principals; whereas proper Cautioners for Sums, who are not so bound, and Cautioners for Performance of Deeds, as Cautioners for Executors and for Curators and Factors, or for Messengers, cannot be pursued, till the Principals be discussed, for they being only obliged, that their Principals shall Pay, Count, or be Honest, therefore they cannot be liable, till the Principals first be discust for Payment and counting, in the first Cases, and for their Delinquencies in the last, and they are only liable, &c.

Book III. But these who are Cautioners for performing of Deeds; as Cautioners for the Executors, and for Curators or Factors, or for Messengers, cannot be pursued, till the Principal be discussed; for they being only obliged, that their Principals shall compt or be honest; therefore, they cannot be liable, until the Principals first be cited to compt in the one Case, or to Answer for their Delinquencies in the other; and they are only liable to make up what is wanting from their Principals, after they are discussed.

36. Because Cautioners for Sums bound *conjunctly* and *severally* are liable as Principals; therefore their Obligation may subsist, though the Obligation of the principal Party be found null, or reduced, by any Privilege given to the Principal by Law: As, if a Man become Caution for a Minor, or, for a Woman who is married, *Nam sibi imputet*, who became a Cautioner for such: but if the Obligation was absolutely null in it self, as, if the Principal did not sign, then this Obligation, because it is but accessory, retains so much of its own Nature, as to free the Cautioner.

Relief of Cautioners.

37. Cautioners are to get Relief from their Principals, not only of the principal Sums and Annualrents, but of all Damage and Interest, and whether the same be provided by the Bond, or not; and, where there are many Co-cautioners, they are liable

liable *in solidum* toward the Creditor (d): But Tit. 3
if any of them pay the whole Sum to the
Creditor, though he get Assignation from
him

(d) An Obligation by many Principals, divides among them *pro rata*, unless, these Words, *conjunctly and severally* be added, which makes each of them liable *in solidum*, wherethrough they become Cautioners for one another, and have a Relief thereupon competent to them; but they differ from Cautioners properly so called, because they're *primi in Obligatione*, they're the principal and chief Caute of the Obligation, whereas Cautioners are *in secundo gradu*, and adhibited for Security of the other.

It being remarked, That by Men's Facility to become Cautioner for their Friends, many Families were undone; For remedying whereof, it is, by *Act* 5. *Parl.* 1695. statuted, 'That no 'Man binding for, and with another, conjunctly 'and severally, in any Bond or Contract for 'Sums of Money, shall be bound longer than seven 'Years after the Date of the Bond, from, and 'after which, the Cautioner shall be *ex ipso*, 'free of his Cautionry: And that, whoever is 'bound for another either as expreis Cautioner, 'or, as Principal, or Co principal, if he hath 'either Clause of Relief in the Bond, or a Bond 'of Relief, a Part intimated personally to the 'Creditor at receiving the Bond, shall be understood to be a Cautioner, and to have the Benefit of this Act, without Prejudice always to 'the two Principals, to be liable in the whole 'Contents of the Obligation, as formerly: As 'also, the Cautioners to be within the seven 'Years bound conform to their Bond; And, that 'the Diligence by Inhibition, Horning, and 'Arrestment, Adjudication, or otherwise done 'within the seven Years, by Creditors against 'Cautioners, for what fell due at that Time shall stand

Book III. him to the whole, yet he must only seek his Relief from the other Cautioners, with *Deduction of his own Part*, which proceeds, albeit there be no Clause of *mutual Relief* in the Bond; and they must communicate to their Co-cautioners what Ease they get by Way of *Transaction* from the Creditor; but, if they get the said Ease by a mere Gratification, as by Donation, &c. then they are not bound to communicate what Ease they get; for a Creditor may justly gratify one of his Cautioners, as his Friend or Relation, without being obliged to gratify the rest.

* Subject-Matter of Obligations.

38. To make *Obligations* effectual, it is necessary that the *Subject-Matter thereof be such as will admit of an Obligation: For no Man can oblige himself to do what is either *impossible* (*a*) *unlawful*, or *dishonest*, nor to transmit the *Property* of Things *acquired*

and good, and have Effect after Expiration of the seven Years.

In applying this Statute, the Lords have excepted from it, Cautioners in Sustentions, Contracts of Marriage, in Bonds for annual or termly Payment of the Tack-duty, and the like.

(*a*) Impossible, *i. e.* against the Laws of Nature, or Physically impossible, or against the Rules of Morality, and Honesty, or against the Laws of the Country; tho' an Obligation by one to do what's not in his Power to perform, falls not under any of these Impossibles, and is effectual; so that when lawful Obligations become impossible, the Debtor is liable for the Value, tho' Obligations naturally impossible have not that Effect.

grade (these not being *in Commercio*) and Heritable, when the *Performance of Obligations* becomes impossible, the Party is liable for the Value, as *Damage* and *Interest*; yet in these the Value is not due, nor will he be liable in a Penalty, in Case of not Performance.

29. BUT yet a Man may oblige himself to do Something not in his own Power, as to cause another *dispone Lands*; and, if he fail, he will be liable *pro damno & interesse*, or for the Penalty.

30. AMONGST *Obligations*, *Donation* is also reckoned, which is an *Obligation proceeding from a Lucrative Cause*, or *Title*: For, he who voluntarily and gratuitously promises to give any Thing, is thereby obliged to deliver the same; and this voluntar giving is called a *Donation*, which is, in Law, defined to be a *mere Liberality proceeding from no previous Compulsion.* Donation

31. IT may be perfected either by Writ, or without it; but, if without Writ, it must be proven by Oath.

32. DONATIONS are either *Simple*, *Remuneratory*, or *Mortis Causa*, that is to say, *Donations made in Contemplation of Death.* Div. of Donat.

33. A *Remuneratory Donation*, called *Gratuitous*, is, when a Man bestows any Thing not gratuitously, but to requite and repay some good Deed done to him, and so is not purely a Donation. Remuneratory Donation

34. A

Donation in Contemplation of Death.

34. A *Donation in Contemplation of Death* is, when the Giver deſigns rather the Perſon, to whom he gifts, to have what is gifted, than any other; but wiſhes himſelf to have it, rather than him to whom he gifts it. And therefore, though *pure Donations* are not *revokable*, yet a Donation *Mortis Cauſa* is, being of the Nature of a *Legacy*; and no Donation is preſumed to be *Donatio Mortis Cauſa*, except it appear to be ſo, either expreſly, or by ſtrong Preſumptions, that the Thing gifted was only gifted *in Contemplation of Death*.

35. GIFTS, being a mere *Liberality*, are not preſumed; and therefore, by *our Law*, *Debitor non præſumitur donare quamdiu eſt Debitor*: But this being only a *Præſumptio Juris*, may be taken off by ſtronger Arguments, juſtly inferring, that *Donation* rather than Payment was deſigned.

TIT. IV.

Of the Diſſolution or Extinction of Obligations.

HAVING cleared how *Obligations* are conſtituted, it remains now to conſider, how they are taken off and extinguiſhed; which is either by a contrary Conſent, or by *Implement* and *Satisfaction*.

2. SINCE *Conſent* is neceſſary to the *Conſtitution of Obligations*; ſo a contrary

Conſent

Consent, whether by a Discharge, or Tit. 4.
pactum de non petendo, does dissolve and extinguish Obligations; *Nam nihil est tam naturale, quam eo genere quidque dissolvi quo colligatum est*: And therefore, if the Obligation be constituted by Writ, it requireth Writ to the Dissolution thereof, which is called a *Discharge*; and Discharges require the same Solemnities that Obligations do; but yet, if the Obligation was satisfied, *via facti*, as by *Intromission* with Rents of Lands, &c. (a) it is probable by Witnesses, as all Facts are. *Discharge*

3. DISCHARGES are either *general, of all that Parties can ask or claim, or particular, of one particular Thing or Subject*: And in general Discharges, if any particular Thing be expressly discharged therein, the general Clause will be extended to Particulars of no greater Importance than those expressly discharged. Discharges general and particular.

4. DISCHARGES do ordinarily bear a Clause *discharging all Preceedings to their Date*; and albeit they do not, yet three *consecutive Discharges* do presume that all bygones are satisfied, if they be immediately subsequent to another, and granted by Parties, having Power to discharge, as *Discharges by Heritors or Chamberlains to their Tenants*; and therefore *Discharges of* Epochatrium morum.

three

(a) Intromission with Victual Rent, and the like, is probable by Witnesses; but Intromission with Money Rent must be proven by Writings Authentick.

three ſubſequent Years granted by Merchants who bought the Farm of theſe Years, will not infer the Preſumption; but it will be inferred by Diſcharges for a part of the three Years granted by the Father, and the reſt by his eldeſt Son, as Heir; the Diſcharges being in Writ, containing a *Diſcharge of the whole Year's Rent*; ſo that partial Receipts, albeit they extend to more than the Years Rent, will not preſume *that all Proceedings are paid*; neither one *Diſcharge for three ſubſequent Terms or Years*, the *Preſumption* being inferred from renewing of the Diſcharges each Year without Reſervation.

Payment. 5. OBLIGATIONS are *extinguiſhed and diſſolved by Payment*, which is, *performing of the Obligation in the preciſe Terms thereof*, and is ſo favourable, that if it be made *bona fide*, *it diſſolveth the Obligation*, albeit, he to whom it was made had no Right. So Payment made to a *Procurator* after the *Procuratory was revoked without the Payer's Knowledge*, will be ſuſtained; and Payment made to *Miniſters ſerving the Cure*, though they have no Title to the Benefice, will liberate the Payers.

Acceptilation. 6. OBLIGATIONS are likewiſe fulfilled by *Acceptilations*, which is an *imaginary Satisfaction*, whereby the *Creditor acknowledges to have got Payment*, when he hath not, and has the Effects and all the *Privileges of Payment*.

7. S.

7. SECUNDO, by *Compensation*, whereby if the Creditor of a liquid Sum become Debitor to his Debitor in another liquid Sum, the two *Obligations extinguish* each other *ipso jure*, and is *equivalent to Payment in all Cases*; but if the Sums be not liquid, or if a Species or Body be craved to compense a liquid Sum, it will not be allowed. Tit. 4. Compensation.

8. TERTIO, *Obligations* are taken away by *Innovation*, which is, the *changing one Obligation for another*; and if the Person of the Debitor be changed, it is called *Delegation*. Innovation.

9. INNOVATION is never presumed, except it be expresly mentioned, or that the Obligation bears expresly to be in *Satisfaction of the former*.

10. QUARTO, *Obligations* are extinguished by *Confusion*; that is to say, when the Debt and Credit meet in the same Person: As when the Debitor succeeds to the Creditor, or the Creditor to the Debitor, or a Stranger to both: And the Reason of the *Extinction* in these Cases is, because the same Person cannot be both Debitor and Creditor. Confusion.

TIT. V.

Of Assignations.

NOT only moveable, but heritable Rights whereupon no Infeftment has

has followed, and all Incorporeal Rights requiring no Infeftment, such as *Reversions, Patronages, Servitudes*, &c. are transmissible by Assignation: But if Sasin be once taken on an heritable Right, it cannot thereafter be transmitted by *Assignation*, but by *Disposition*, which is a Writ disponing Lands or other moveable Rights, containing a *Procuratory of Resignation and Precept of Sasine*: And though a Liferent at first is to be compleated by a Sasine, as differing from other heritable Rights only in its Endurance, yet being once compleated, it may thereafter be transmitted by *Assignation*; for it continues not then to be a formal Liferent Right in the Person of the *Assignee*, but resolves only in a temporary Right during the Cedent's Lifetime.

Disposition.

2. He, who grants the *Assignation*, is called the *Cedent*, and he, who receives it, is called the *Assignee*.

Cedent and Assignee.

3. An *Assignation* is also compleated by Intimation; and therefore, in Competition betwixt divers Assignees the first *Intimation* is always preferred (a): This *Intimation*

Intimation.

(a) The Author of the Notes subjoin'd to former Editions, says, That the Intimation of an Assignation is supply'd by a Writ under the Debitor's Hand, acknowledging the Production of the Assignation, which may be thought, is apt to the Purpose, neither is it in Practice otherwise

timation is made by a *Procurator* who takes Tit. 5.
Instruments in the Hands of a *Notar*, that such an Assignation was intimated, (so that one Man cannot be both *Notar* and *Procurator*;) and if after this, the Debitor pay the Cedent, he must repay it to the *Assignee* because the Cedent was denuded by the Assignation; and the Intimation puts the Debitor in *mala fide* to pay the Cedent: And for that same Reason, the Cedent's Oath will not prove against the Assignee, if the Assignation be for an *onerous Cause*, and was *duly intimated*.

4. But, if the Assignation be Gratuitous, or for the Cedent's Behoof; or if the Matter be Litigious, the Assignation being after a depending Process, in any of these Cases the Cedent's Oath will prove against the Assignee.

5. A *Pursuit* or *Charge of Horning* upon the Bond assigned has likewise the Force and Effect of an Intimation.

6. The Debitor's private Knowledge of the Assignation is not equivalent to an Intimation; but his paying a part of the Sum, or Annualrent for it, is equivalent to an Intimation; and much more the writing a Letter promising to pay, since that is in Effect a *renewing the Obligation*.

wise, than by getting a Bond of Corroboration in Favours of the Assignee, which cannot regularly be enumerated among the Ways of Intimation here intended.

Book III.

7. Bills of Exchange, and Orders by Merchants to pay, need not be intimated; because in Commerce we are governed by the *Law of Nations*: Nor need Assignations to Reversions be intimated, because the *Registration is a Publication of them*, (the Registration of *Sasines* and *Reversions*, being designed for *Publication*.) But the using Inhibition against the Cedent upon the *Assignation* is not equivalent to an *Intimation*, the chief Design of *Inhibitions* being for Execution, and not for *Publication*. *Legal* and *judicial Assignations*, such as, *Apprisings*, *Adjudications*, and *Marriage*, need no *Intimation*; and that because they are past, and expede publickly.

Blank Band.

8. A blank Band is equivalent to an *Assignation*, and so must be intimated (*b*); and in *Competition* with other Rights, it is only preferred according to the Date of the *Intimation*, that the Receiver's Name was filled up in it.

9. It is a *general Principle in our Law, that in the Competition of moe Creditors, the first*

(*b*) By *Act* 25. *Par.* 1696. it is statuted, *That no Bond, Assignation, Disposition, or other Deed, be subscribed blank in the Name of the Person in whose Favours they are conceived and that the Persons be insert either before or after subscribing, or at least in presence of the same Witnesses adhibited to the subscribing before Delivery, certifying that all Writs otherways subscribed and delivered blank shall be null.*

firſt compleat Diligence is ſtill preferred (c). And therefore an Aſſignation is preferred to an Arreſtment, if it be intimated before the Arreſtment; but if the *Intimation* and *Arreſtments* be in one Day, they come in *pari paſſu*; except the *Arreſter* be *in mora*, and do no *Diligence* upon his *Arreſtment*. Or, that both Diligences expreſs the Hour of the Day, and the one be prior to the other.

(c) In Competitions there's no Regard to Anteriority of Debts, or of the Dates in Bonds, for the Brocard *prior tempore potior jure* reſpects only the Diligence done on theſe Documents.

TIT. VI.

Of Arreſtments and Poindings.

THE ordinary Diligence in our Law affecting *moveable Rights*, are *Arreſtment*, which anſwers to *Inhibition* in *Heritage*; and *Poinding*, which anſwers to *Compriſing in Heritage*.

2. ARRESTMENT is the *Command of a Judge diſcharging any Perſon, in whoſe Hands the Debitor's Moveables are, to pay or deliver up the ſame, till the Creditor who has procured the Arreſtment to be laid on, be ſati[illegible]* Arreſtment.

3. ARRESTMENTS may be laid on by any Judge in whoſe Territories the Goods are, or by the *Lords of the Seſſion*, where-ever they ly, and that by *ſpecial Letters of Arreſtment*; or by a Warrand expreſſed in

the *ordinary Letters of Horning*: Theſe *Letters* are executed by a Meſſenger; and if after it is laid on, the Party in whoſe Hand it is made, pay, he may be forced to pay the ſame over again, and may be purſued *Criminally*, for breaking *Arreſtment*, the Puniſhment being *Confiſcation* of *Moveables*, and their Perſons to be in the *King's Will**.

*K. J. VI. Par. 7. Act 118.

4. ARRESTMENT can only affect *Moveables*; but all Sums of Money due by Bonds, whereupon no Infeftment has followed, are arreſtable †: And, as *Moveables* can only be arreſted; ſo the Ground thereof muſt only be for Payment of moveable Debts (*a*), or, *ex paritate rationis* for Payment of ſuch Debts, which are not ſecured by Infeftment; and it reaches only to the Sums already due, or for which the Year or Term is current.

†K. C. II. Par. 1. Seſſ. 1. Act 51.

5. HOW ſoon an Action is raiſed againſt a Perſon, his *Goods* may thereupon be arreſted and this is called an *Arreſtment upon a Dependence*; but this *Arreſtment* may be looſed by Letters for looſing of *Arreſtment*, which paſſes upon a *common Bill*

Arreſt. upon a Depen.

(*a*) The Ground on which Arreſtment is raiſed, muſt be a perſonal Obligation, and it makes no Difference, whether the Sum be ſecured by Infeftment, or not. Our Author's Poſition being according to the ancient Practick, which made a moveable and an immoveable, a perſonal or real Security (by Infeftment) for the ſame Sum, incompatible, which is now derogated from.

Bill (*b*); And a *Bond of Cautionry* is given to the *Clerk of the Bills* † wherein the *Granter of the Band* obliges himself to pay the Sum, if the *Arreſtment* be found lawful, and the Sums or Goods decerned to belong to the *Arreſter*; but *Arreſtments* upon a *Decreet* (or which is equivalent) on a regiſtrate Band, cannot be looſed at all, except the Decreet be turned into a Libel; that is to ſay, the Lords do only ſuſtain the Decreet as a Libel or Summons againſt the Defender, or that the *Arreſtment* was laid on after the Decreet was ſuſpended; for in either of theſe Caſes *Arreſtments* may be looſed, even upon Decreets. Tit. 6. † K. J. VI. Par. 22. Act. 17.

6. ARRESTMENT being but a *perſonal Prohibition* againſt the Defender to pay, it laſts no longer than the Lifetime of him, in whoſe Hands the Arreſtment is made, except it be renewed againſt his Succeſſors; but it dies not with him in whoſe Favours it was raiſed, nor with him for whoſe Debt it was laid on; and if the Debt be not liquid, the Debitor's *Repreſentative* muſt be called to the *Liquidation*.

7. IN the *Competition* amongſt moe *Arreſters*, Preference is granted according to the *Priority even of Hours*; and the firſt Arreſtment is not preferred, if the *poſterior Arreſter* get the firſt Decreet, to make the ar- Competition of Arreſtment.

(*b*) Arreſtments raiſed on Bonds or Decreets, and executed before the Term of Payment; as alſo theſe raiſed upon Bonds not regiſtred, tho' the Term of Payment be paſt, may be looſed.

arrested Goods forthcoming; for Arrestment being only an inchoated Diligence, it is compleated by the Sentence to make Forthcoming; and yet if the Arrester did exact Diligence to obtain a Decreet, his raising the first Pursuit will prefer him (c). He also who Arrests on a Decreet, will be preferred to him who Arrests on a *Dependence* (d); and he who Arrests after the Term of Payment, will be preferred to him who Arrests the Term, *cæteris paribus* (e).

8. The

(c) When the first Arrester pursues a Forthcoming before the Lords of Session, and is not *in mora*, if a posterior Arrester prosecute a Forthcoming before an inferior Court, tho' he obtain Decreet of Forthcoming before the other, yet, the first Arrester in a Competition will be preferred, tho' his Decreet of Forthcoming be last: For the Person, in whose Hands the Arrestment is laid, is not *in tuto* to obtemper the Decreet of the inferior Judge, but ought to suspend it, and execute a Summons Multiple Poinding against all Arresters, and the Expences ward out on these Accounts will be all wed to him.

(d) If the Pursuer of a depending Process be the first Arrester, and, before the Forthcoming at the Instance of the other Arresters be concluded, by an extracted Sentence, shall produce a Decreet following upon the Libel which was the Ground of his Arrestment, he will be preferred to these whose Arrestments were founded on a Decreet.

(e) It is lately decided, That an Arrestment in the Hands of one, who pays, termly or annually, a certain Sum of Money as Annualrent or Tack-duty laid on betwixt Terms, will affect not only what is already due and payable, but also what is current, & adhuc cessit, sed nondum venit.

8. THE King's Penſions and gratuitous Aliments cannot be arreſted, becauſe they are given for a particular and favourable Uſe, and not applicable to the Arreſter (*f*).

9. POINDING may be likewiſe uſed againſt Moveables by virtue of *Letters of Horning* againſt the *Debitors*, containing *Poinding*, or any other inferior Judge, his *Decreet* or *Precept**, which is done by a Meſſenger after the *Days of the Charge are expired*†: The Form thereof is, The *Meſſenger*, after poinding the Goods, Appriſes them upon the Ground where he apprehends them, and offers them to the Debitor for the Sum for which they were appriſed; and if he compear not, he *carries them to the Market Croſs of the head Burgh of the Shire, or other Juriſdiction where they are pointed*, and there he *Appriſes them*, and delivers them to the *Party* who is called the *Pointer*; but if any compear, and offer to make *Faith that the Goods belong to them, and not to the Debitor*, then the Meſſen-

Poindings.

* K. J. VI. *Par* 12. Act 0. K. C. II. *Par.* 1. Seſſ. 15 Act 29.

† K. C. II. *Par.* 1. Seſſ. 1. Act 4.

(*f*) No Kind of Aliments can be arreſted, Fees due to a Commiſſioner in Parliament, and Salaries due to the King's Miniſters and Servants are without reach of this Diligence. As alſo Arreſtment of Fees due to a Servant, affects only what is more than may ſerve for Aliment, and Cloathing neceſſary and ſuitable to him in the Station of his Service.

Meſſenger muſt deliver them to that *Party*, elſe he is liable in a Spuilzie (g).

10. POINDING is a *judicial Sentence*, and the *Meſſenger is Judge conſtitute by the Letters, the Meſſenger writes likewiſe an Execution of Poinding*, and that *Execution* is better believed than any who offers to prove the contrary; for that *Execution* is only quarrelable by *Improbation*.

11. ARRESTMENT being but an inchoated Diligence, diſcharging the *Party* in whoſe Hand the Arreſtment is made to pay, the Right to the Goods arreſted remains ſtill in the Debitor, and may be poinded for his Debt; for *Poinding is a compleat Diligence*, giving an abſolute Right to the *Goods poinded*.

12. POINDING cannot be after the *Sun is ſet*; for it is a Sentence.

13. LA-

(g) If the Goods to be poinded were lent to the Debitor, the Meſſenger refuſing to deliver them to the true Owner, is in a Default; nevertheleſs, if theſe Goods did originally belong to the Debitor, and were diſponed to a third Party (whether for Cauſe onerous or gratuitous) but *retenta poſſeſſione*, the Meſſenger finding theſe Goods in the Poſſeſſion of the Debitor, may, without hazard of Spuilzie, proceed to poind them: And if the Aſſigney to theſe Goods, or any for him, produce the Diſpoſition, and offer to interrupt the Poinding, he will be liable to the Creditor *in valorem* of the Goods that might have been poinded; as was firſt found in the Caſe of againſt Sir *John Halyburton* and has now become the daily Practick.

13. LABOURING *Oxen*, or other *Plough Goods*, cannot be pointed in time of Labouring, (least Labouring should be otherwise discouraged) except there be no other Moveables upon the Ground to be pointed *. Tit. 7. Labouring Oxen. *K. J. IV. Act. 98.

TIT. VII.

Of Prescriptions.

PRESCRIPTION being a Way of evacuating and annulling both heritable and moveable Rights, comes in here after both these are explained.

2. PRESCRIPTION is defined, an *Acquisition of Property by the Possessior's continuing his Possession for such Time as the Law determines*; which was introduced not only for punishing the *Negligence of the Proprietar*, who owned not his Right for so many Years, but likewise for securing Possessors, and such as derived Right from them; and least, by a constant Uncertainty, the Possessors being unsecure, might neglect the *Improvement of what they possessed*. Prescription.

3. HERITABLE Rights, (under which I comprehend *Wadsets*, *Heritable Offices*, *Servitudes*, *Patronages*, &c.) and all Actions depending upon them, or relating to them, prescribe with us in 40 Years; if the Possessor, Prescript. of heritable Rights.

session, being a singular Successor, have a Charter, Disposition, or Precept, and Sasine in his Person; or being an Heir, have a constant tract of Sasines continuing and standing together for the Space of 40 Years, flowing upon Retours, or Precepts of *Clare Constat*: For the Law did not trust a Sasine alone, it being only the *Assertion of a Notar*; but *Reversions*, which are in the Body of the Possessor's Right, or *Reversions* duly registrated, prescribe not.

K. J. VI. Par. 22. Act 12.

Prescript. of Personal Rights. *K. J. III. Act 29. Act 35.

4. All *Personal Rights* and *Actions* relating to them, prescrive likewise in 40 Years: If a Document be not taken upon that Right, that is to say, *If nothing be done whereby the true Proprietar declares his Intention to follow and own his Right* *.

5. In both these Prescriptions, the extraordinary length of Time supplies the want of *bona fides* in the Possessor (*a*), but by the *Civil Law*, Things *Sacred*, *Religious*, or *Publick* (*b*), could not be prescribed; nor yet

(*a*) The Length of Time prescribed by Law, and the true Proprietar's Taciturnity during that whole Space, induces a presumptive Dereliction, and supplies the Defect in the Possessors Title, and supposes a *bona fides*.

(*b*) No Portion of the King's annexed Property can be prescribed; and with Respect to things Sacred or Religious, it is to be noticed, if the Thing under Question belong to the Spiritualty of the Church, as Tithes, &c. or Temporality there-

yet things robbed or ſtoln (*c*), there being a *vitium* real, which affects all thoſe things; but whether this will hold in our Law, is neither clear by our Statutes nor Deciſions. Tit. 7.

6. ACTIONS of *Spuilzie and Ejection*, preſcribe in three Years after committing thereof, as to the *Specialities* of theſe *Actions* viz. the violent *Profits and Oath in litem*: But *Minors* have three Years after their *Majority* †. Preſcriptions of particular Actions. † K. J. VI. *Par.* 6. Act 82.

7. AS do alſo Actions for *Servant-Fees*, *Houſe Mails*, and *Merchant-Compts*; except they can be proven after theſe three Years *by the Debitor's Oath* *; And Removings, if Actions be not intented without three Years after the Warning †; and in theſe laſt *Preſcriptions Minority is not excepted*. * K. J. VI *Par.* 6. Act 83. †, K. J. VI. *Par.* 6. Act 82.

8. IF Aſſizers err in ſerving a Man wrongouſly Heir to his Predeceſſor, the Retour may be quarrelled within Twenty Years; but the Aſſizers themſelves can only be purſued for Error within three Years † (*d*), but the Right of Blood itſelf never Aſſizers. †K. J. VI. Par. 22. Act 3.

thereof, as Lands, Civil Juriſdictions, or the like, it may be thought, that the firſt cannot, the other may, be preſcribed. See *Stair's* Book II. Tit. 12. § 22. and 25.

(*c*) Forty Years peaceable Poſſeſſion of things robbed or ſtoln purges the Vitioſity of the Title, or the *modus habendi alter. Stair's* Tit. foreſaid, § 9.

(*d*) Our Author, in his Obſervations on the Act cited, ſays, *That the Preſcription of twenty Years*,

never prescribes: And therefore a Man may be *served Heir to his Father or Grandfather*, after a Hundred Years, being debarred by no Time. *Nam jura sanguinis nullo jure civili adimi possunt*: But this is to be understood where there is no Service; for if there be once a Service, though of a wrong Person, it cannot be quarrelled after Twenty Years.

9. If a Person who is forfaulted, possessed Lands as heritable Tenant for five Years before the Fortaulture, without Interruption, the King is obliged to show no Right in the Person of him who was forfaulted to the Lands, or others that he possessed; because 'tis presumed, that the *Person forfaulted would abstract the Writs*, which

militates only in Cases of Competition betwixt the several Kinds of Heirs amongst themselves, as whether the Heir of Line should be preferred to the Heir of Tailzie. But it does not exclude the clear Interest of Blood. For *jura Sanguinis nullo Jure Civili dirimi possunt l.* 8. *ff. de Reg. Jur.* And therefore, an elder Brother was found to have good Interest to reduce a second Brother's Retour, *Jan.* 11, 1673. By this Act, though such Retours may be reduced in Prejudice of Persons so served; yet singular Successors acquiring *bona fide* Rights from Persons so served wrongously, cannot be prejudged, which our Law hath introduced for the good of Commerce, in Favours of singular Successors: For, how should they know, that the Retour was reducible, when it has not been quarrelled within the Time appointed.

which *quinquennial Poſſeſſion* is to be tried by an *Inqueſt of the Shire where the Lands ly* (*e*). And if the *Traitor* was in Poſſeſſion the Time of the Forfaulture, though he poſſeſſed not five Years before the Forfaulture, the King or his Donator muſt be continued in Poſſeſſion for five Years, that, in the mean time, the *Traitor's* Tacks and other Rights may be ſought out. Tit. 7. K. J. VI. *Par.* 9. Act 2.

10. ARRESTMENTS on Decreets and depending Actions preſcribe within five Years, *viz. Arreſtments on depending Actions five Years after Sentence, and on Decreets five Years after their Date*

11. MAILS and Duties due by Tenants preſcribe, if not purſued within five Years after the Tenant's removing. *Miniſters Stipends* and *Multures* preſcribe, ſo that they cannot be purſued after five Years, except they be proven by the Debitor's Oath, or by Writ (*f*).

12. HOLO-

(*e*) By *Act* 33. *Parl. July* 1690, All Eſtates forfeited, are declared ſubject to all real Actions and Claims againſt the ſame, tho' they be not raiſed, nor proſecuted within the five Years preceeding the Forfeiture, excepting bygone Feuduties, Annualrents, and other annual Preſtations, for which there is no Diligence done within five Years, preceeding the Forfeiture, and that notwithſtanding of *Act* 2. *Par.* 1584, which is in ſo far reſcinded.

(*f*) By *Act* 9. *Par.* 1696. it is ſtatuted, *That Actions of Compt and Reckoning competent to Minors, againſt their Tutors or Curators, for making their*

12. HOLDGRAPH Bands and Subscriptions in *Compt Books* prescribe in twenty years, except they be proven by the Debitor's Oath.

13. AND lastly, All Bargains provable by Witnesses, prescribe as to that Manner of Probation, if not pursued within five Years after their Date; all *Actions on Warnings, Spulzies, Ejections, Arrestments, Ministers Stipends*, &c. prescribe within ten Years unless wakned every five Years; but this alters not any shorter Prescriptions of these Actions ‡.

‡ R. C. II. Par. 2. Sess. 2. Act 9.

14. AND for clearing the Meaning of the Statute appointing these Prescriptions, by a late Statute, *Anno* 1685, it is ordained, *That all those Actions, mentioned in the said Act* 1669, *which were intented or depending before the Date of the said Act* 1685, *should prescribe within five Years thereafter, if they be not wakened within that Time; and all Actions to be intented after the said Act, should prescribe within five Years, if they be not wakened within that Time.*

15. ALL *these Accompts, not pursued and insisted in within ten Years, either after their Majority, or after their Death they dying in Minority, shall after that Time, prescribe for ever.* And it is declared, *That the contrary Action at the Instance of Tutors or Curators against their Minors, shall prescribe within the same Space, and that all Actions already raised, or competent to be raised by either of the said Parties against the other, shall prescribe within ten Years after the Date of the Act, which is, Sept.* 25. 1696. But this last Prescription runs not against Minors.

15. All these *Prescriptions* run *de Momento in Momentum*, so that the *Prescription* runs till the last Moment of the Time allowed; but they run only from the Time wherein the Debt could have been pursued, since till then the Proprietar could not be called *Negligent*, which *Negligence* is the main Foundation of *Prescriptions*: And therefore, *Prescription* runs not against a *Band* from the Date thereof, but only from the Term of Payment: And *Prescription* of an Action of *Warrandice* runs only from the *Eviction* †, because, no Man is liable in *Warrandice*, till the Lands be evicted; and from the same Principle it is, that *Contra non Valentem agere, non currit Prescriptio*; and that *Prescription* runs not against *Minors* in most Cases, in whom *Negligence is not punishable*, since it proceeds from no Design, but from the *Unripeness* of their Age. Tit. 7.

† K. J. VI. *Par.* 22. Act 12.

16. VASSALS cannot prescribe against their *Superiors*, because the *Vassal's Right* acknowledges the *Superior's*; nor can *Laicks* prescribe a Right to *Teinds*, being incapable of such Rights after the *Lateran Council*; but though the Right itself prescribes in neither of these Cases, yet the Bygones due by Virtue of these Rights before forty Years may prescribe (g).

17. Pre-

(g) Since that Parsonage Tithes in the Superius thereof, more than serves for a competent Living

17. PRESCRIPTION runs against the *Kirk and Mortifications*; But on the other Hand, because *Churchmen are Negligent, and Rights may be lost in the Change of Intrants*; therefore thirteen Years Possession is sufficient to maintain a *Churchman in Possession*; which is called *Decennalis & Triennalis Possessio*, and is a *presumptive Title*, and sufficient till a better be shown, by which it may be excluded; for *Præsumptio cædit veritati*.

Prescription.

18. PRESCRIPTIONS run likewise against the King, except as to His Majesty's *annexed Property*, or to his *unannexed Property*; whereof the *Farms*, *Duties*, or *Feu-*

Living to the Clergy, are *in Commercio*; and accordingly conveyed from Hand to Hand; it is not to be doubted, but Laicks may, with respect to one another, prescribe a Right to Tithes, as well as to other temporal Things: But even in Cases wherein Rights cannot prescribe, a Person who is bound to make annual or termly Payment of Money or Victual, as a Vassal, with Respect to his Superior and Feudsty, a Tacksman who hath a long Tack of three nineteen Years, or of Fourscore, or a hundred Years, with Respect to his Landlord, the Proprietar of Lands liable in Tithes, either to a Titular, or to a Clergyman, cannot be pursued for Payment of these Duties due for Years beyond Forty. And it is well known, that Vicarage Teinds are subject to Prescription. See Book II. Tit. 10. § 8.

Feu-Farms, have been compted for in *Exchequer*, since *August* 1455 Years *.

(e) Tit. 7. H. K. C. L. Par. 1. Act 12.

19. ANY Deed, whereby the true *Proprietar* owns his Right, during the Course of the *Prescription*, is called *Interruption*; and *Prescription is interrupted in our Law*, either by a *Process*, or *a Charge raised within the Years of the Prescription*; and a Citation on a *Summons interrupts*, tho' thereafter past from *pro loco & tempore*; but Registration of a Writ interrupts not Prescription: And *Interruption by Citation is not sufficient*, unless it be made by *Messengers personally*, or at the *Party's Dwelling-house, and that it be renewed every seven Years* †; and that the *Execution be signed by the Messenger and Witnesses*.

Interruption.

† K. C. Ib. Par. 2. Sess. 1. Act 9.

20. DILIGENCE used upon a Writ interrupts, as to all Parties concerned therein, for it *binders the Writ itself to prescrive*: And therefore Diligence against any of more Principals, or against any of the *Cautioners*, interrupts *Prescription*, *quoad* the whole *Principals and Cautioners*; and

(e) The *Act* 12. *Par.* 1633, cited by our Author, does not free either the annexed or unannexed Property from Prescription, but ratifies a singular Method proposed by the Lords of Session, and approved by the Lords of Privy Council, for interrupting Prescription of Rights made to the Prejudice of the Crown. See the Act with our Author's Observations on it.

Interruption as to a Part, interrupts the *Prescription of the whole*; so that if a Man arrest *the Mails and Duties of any Part of a Barony, he interrupts Prescription as to the whole Barony (f).*

(f) A Warning whereupon Summons of Removing is not raised and prosecuted within Year and Day after the Term, at which the Tenant is required to remove, will not interrupt Prescription of bygone Tack duties resting more than forty Years preceeding the Warning.

By *Act* 19. *Parl.* 1696. it is ordained, *That all Summons made use of for interrupting the Prescription of real Rights shall pass upon a Bill, and contain the whole Grounds and Warrands upon which it proceeds, and that the Summons and Executions thereof and all Instruments of Interruption shall within forty Days after their Date, be registrat in a particular Register, to be kept at* Edinburgh, *and that in the same Manner, and with the same Formalities, as are ordain'd by former Acts concerning Registrations of Seasins and Inhibitions; which Registration of Interruptions, is to be kept in Books apart.* It is declared, *That Interruptions not registred, as above, shall, with Respect to singular Successors, be of no Force, without Prejudice to have the Effect of Interruption, as to the Persons against whom used.* It is also declared, *That Interruptions of Prescription of real Rights made* via facti, *shall have no Effect, unless an Instrument be taken thereupon, and registred, as said is, and all Summons with their Executions already raised, or Instruments already taken for Interruption, are ordained to be registred within a Year after the Date of the Act*, which is, *Octob.* 9. 1696. But by *Act* 3. *Parl.* 1698. it is declared, *That this Year's Space shall not run against Minors.*

TIT. VIII.

Of Succession in Heritable Rights.

HAVING formerly shewed how *Rights*, whether *Heritable* or *Moveable*, *Real* or *Personal*, are constituted, and how they are transmitted to singular *Successors*: It remains now to consider, how these Rights are transmitted by Succession, beginning first with Succession in Heritage,

2. AN *Heir* is he, that *succeeds universally to all that belonged to the Defunct*; and is therefore, in Construction of Law, *one and the same Person with the Defunct*. Heir.

3. THOUGH the *Executor* be in Effect the Heir in *moveable Rights*, yet we call those only *properly Heirs who succeed in Heritage*; and, with us, there are several Kinds of Heirs, distinguished by their several *Denominations*.

4. THE first and chief Kind of *Heirs*, are the *Heirs of Line*; who are so called, because they succeed *lineally* according to the *Right of Blood*; and they succeed thus: Heir of Line.

5. FIRST, *Descendants*, according to the *Proximity of their Degree*, in which the eldest Son is preferred to all his Brothers, and all the Brothers to the Sisters; and, if there be only Sisters, they succeed all equally. Descendants.

6. The next Degree is *Grand-childre* and their *Great-grand-children*, *&c.* wh ſucceed all in the ſame Way.

Collaterals.

7. If there be no *Deſcendants*, then *Collaterals* ſucceed, in which the firſt Degree is *Brothers and Siſters German*, for the *whole Blood excludes the half Blood*, and Brothers the Siſters, and Brothers by the Father's Side, exclude Brothers by the Mother's Side; there being no Succeſſion with us by the Mother's Side.

8. Failing *Deſcendants*, the Succeſſion goes to the *Defunct*'s Brother's-German, one after another, and to their Deſcendants; which failing, to his Siſters German jointly, and in Defect of them, to the Brothers *Conſanguinean*, one after another, and to their Deſcendants; which failing, to his Siſters *Conſanguinean* jointly. And, if there be none of theſe beforementioned, the Father ſucceeds, and after him the Father's Brother's and Siſter's-German, or *Conſanguinean*, in a Preference the ſame, as above; and failing ſuch, the Succeſſion goes to the Grandfather, *&c.* and ſo forth upwards, as long as any *Agnate Propinquity* can be proven: And, if there be no *Bloodſman* of the Father's Line, the King ſucceeds as *ultimus Hæres*.

Right of Repreſentation.

9. It is to be obſerved, that in *Heritage* there is a *Right of Repreſentation*, whereby the *Deſcendants* exclude ſtill the *Collaterals*, though nearer by many Degrees to the Stock

Stock, or *Communis Stipes*: And thus the *Great-grand-child* of the eldeſt Son ſecludes the ſecond Brother; becauſe, he comes in Place of, and ſo repreſents the elder Brother, his *Great-Grand-father*. Tit 8.

10. THE *Heir of Line* has Right to the *Heirſhip-moveables*, and excludes all other Heirs therein: *Heirſhip Moveables are the beſt of each Kind of Moveables*, which are given to the Heir, becauſe, he is excluded from all other Moveables: If there be *Pairs* or *Dozens*, he gets the beſt *Pair* or *Dozen*; but in others he gets only one ſingle Thing. None have Right to Heirſhip-moveables, but the *Heirs of Prelates*, under which are comprehended all *Beneficed Perſons*; the *Heirs of Barons*, under which are comprehended, all who are *infeft in Lands*, though not erected in a *Barony*, yea, even if they be infeft in Annual-rents, and the Heirs of Burgeſſes, by which are meaned actual Trading, but not *Honorary Burgeſſes*: And, if a Man was once a Baron, he is ſtill preſumed to continue ſo, except it can be proved, that he is diveſted; and that is the Senſe of the *Brocard, Semel Baro ſemper Baro.* Heirſhip Moveables.

11. AN Heir of *Conqueſt* is he, *who ſucceeds to the Defunct in Lands, and other Heritable Rights, to which the Defunct did not himſelf ſucceed as Heir to his Predeceſſors*; as for Inſtance, what a Father leaves to a ſecond Son is Conqueſt, though he got the Heir of Conqueſt.

same from his Father, because he was not *alioqui successurus*: But, if the Father dispone to his eldest Son any Part of his Estate, this is not Conquest, but *Præceptio Hæreditatis*; because, he was *alioqui successurus*: And the Rule is, that Heritage descends, and Conquest ascends; so that, if the Middle of three Brothers die, his immediate elder Brother would be his Heir of Conquest; and, if a Son of a second Marriage die, leaving three Brothers of a former Marriage, the youngest would succeed in his Conquest-Lands; and this, I conceive, was introduced, for enriching the elder Brothers, whom our Law still favours; whereas Heritage must descend according to the Law of Nature.

12. These *Heirs of Conquest* have Right to all Lands, Annualrents, Heritable Bands, and others, whereupon Infeftment did, or might follow, but they have no Right to *Tacks*, *Pensions*, *moveable Heirship*, and all other Rights having *Tractum futuri temporis*, and requiring no Infeftment, and so, not *competent to Executors*; all which belong to the *Heir of Line*.

Heir's Male

13. The *Heir Male* is the nearest *Male*, who can succeed; and all *Heirs of Line*, are also called *General Heirs*; because, they succeed by a general Service, and represent the *Defunct* universally.

General Heirs

Heir of Tailzie

14. The *Heir of Tailzie is he, to whom an Estate is tailzied*, so called, because the legal

legal Succeſſion is cut off in his Favours Tit. 8.
from the *French* Word *Tailer*, *to cut*; and
the Matter of *Tailzies* may be *ſummed* up in theſe *few Concluſions*.

15. PRIMO, If a Fiar or Proprietar do only ſubſtitute the Perſons who are to ſucceed one to another, this is called a *ſimple Deſtination*; and it may be broke or altered by the Maker, or by the reſpective Members as they ſucceed, even though an Inhibition were ſerved thereon; for there being no Obligation not to alter, there can be no Foundation for an Inhibition.

16. SECUNDO, If the Maker deſign that his *Tailzie* ſhould not be altered, he either adjects a prohibitory Clauſe *de non alienando*, or not to alter the *Tailzie*; and then, though the Maker may alter it, yet neither the *Inſtitutes* nor *Subſtitutes* can alienate by any voluntar or gratuitous Deed; for elſe that Deed would be reducible on the *Act of Parliament* 1621, as done in Prejudice both of the Maker, and of the *remoter Subſtitutes*, who are to ſucceed, and, who are *Creditors* by the ſaid prohibitory Clauſe: Or Inhibition may be raiſed upon the ſaid prohibitory Clauſe, after which the *tailzied* Lands cannot be diſponed, even for an *onerous Cauſe*.

17. TERTIO, If the Maker deſign that the *tailzied* Lands ſhould not be alienable, even for *onerous Cauſes*, then he adjects to the *Pactum de non alienando*, a *Clauſe irri-*

irritant and *reſolutive*, declaring all Deeds done contrary to, and in Prejudice of the *Tailzie* to be null and void; and, in that Caſe, all poſterior Alienations, even for onerous Cauſes will be reducible; tho' no Inhibition be raiſed thereon: And, becauſe ſuch Clauſes prejudge Creditors and Commerce very much, and ſeem to be inconſiſtent with the Nature of Property and Dominion; Therefore, an*Act of Parliament was neceſſary for ſecuring them: And, generally, in all theſe Caſes, the Contraveener prejudges not only himſelf, but all the *Heirs* that might ſucceed by him (*a*); ſo that there is Place for the next Subſtitute, who may, in either of theſe Caſes, ſerve himſelf Heir to the Maker, (though generally a Man ſhould be ſerved Heir to him who was laſt infeft) or, he may ſerve himſelf Heir to the Contraveener who was laſt

*K. J. VII. Par. 1. Act 22.

(*a*) The Heirs deſcending, and of the Contraveener's Body, will not be excluded, except it be ſo expreſly provided; for Tailzies, eſpecially the irritant Clauſes, are literally interpreted, and being odious, are *ſtricti Juris*.

The ſubſtitute Heir of Tailzie, to whom the Succeſſion after the Contraveener belongs, may be ſerved, either to the Maker, or to the Perſon infeft immediately before the Contraveener, or even to the Contraveener himſelf, if there be a *Premiſe*, that he ſhall not be liable to fulfil his Obligations: But in this, the Rule is the Will of the firſt Tailzier, expreſs'd in the Conſtitution of Tailzie.

laſt inſeft, without being obliged to fulfil his Deeds. Tit. 8.

18. QUARTO, If a Man oblige himſelf to *tailzie* his Lands, he is obliged once to *tailzie*, but not to continue the *Tailzie*; but, if the Obligation be made for an onerous Cauſe, the ſame is not revocable, as if the *Tailzie* be mutual.

19. QUINTO, Where *Tailzies* are made to two Strangers jointly and their Heirs, they ſucceed to equal Halves, and they are both Fiars: But, if Lands be taken to a Man and his Wife in conjunct Fie and Liferent, and their Heirs, the Husband is Fiar, and the Wife's conjunct Fie reſolves only in a Liferent; and yet in Subſtitutions to Moveables, both their Heirs would ſucceed equally.

20. SEXTO, In conjunct Fies theſe general Rules hold, that the Husband is Fiar, becauſe of the Prerogative of the *Sex*; and that he is Fiar on whom the laſt Termination falls: Yet both theſe Rules hold only *preſumptive*, and may be over-ballanced with ſtronger Preſumptions; as for Inſtance, if the Reverſion of Lands belonging to the Wife, as Heretrix, be taken to the Husband and Wife, and their Heirs, the Wife's Heirs would exclude the Huſband's Heirs; for it is preſumable, that the Reverſion ſhould follow the heritable Right; Or, if a Father ſhould take Security in Lands to himſelf, his Son, and their

their Heirs, the Father would remain Fiar, which does likewiſe hold, though the Security were taken to the Father and Son *nominatim*, and the Son's Heirs, even though the Son were infeft; for it is preſumable, that the taking Infeftment was only deſigned to complete the Security, and to ſubſtitute the Son, but not to exclude the Father from his own Fie: And, generally, in all Subſtitutions, the chief Thing to be conſidered, is the Deſign of the Parties.

Heirs of Proviſion.

21. HEIRS *of Proviſion* are theſe, who ſucceed by Virtue of a Particular Proviſion in the Infeftment, ſuch as the Heirs of a ſecond Marriage: And, as to theſe Heirs of Marriages, we may obſerve two Things, *Firſt*, That, if a Father, by his Contract of Marriage, be obliged to employ a Sum to himſelf, and the Wife in conjunct Fie, and the Heis of the Marriage, he cannot, in Prejudice thereof, do any *fraudulent gratuitous Deed*, though he may provide a Jointure to a ſecond Wife, or Proviſions for his Children of a ſecond Marriage.

22. SECUNDO, Though a Father may aſſign or diſpone Sums to Children, when extant, whereby they will be preferred to poſterior *Creditors*, as becoming *Fiars* by the ſaid Rights; yet, if the Father diſpone to Children to be procreate, this will be conſidered only as a Deſtination, and

ſo

ſo will not hinder the Father to make poſterior Rights, to Strangers, or even poſterior Creditors to affect by Diligences what is ſo diſponed. Tit. 8.

23. TERTIO, *Proceſs* will be ſuſtained at the Inſtance even of the apparand Heir of the Marriage againſt the Father, to fulfil the ſpecial *Obligations* therein, or to purge any Deeds already done by him in Prejudice thereof.

24. ALBEIT, where Heirs are not ſpecially deſigned in any Right, the *Heirs of Line* exclude all other Heirs; yet, if a Man take Lands to himſelf, and his *Heirs Male Tailzie* or Proviſion, and thereafter acquire Reverſions, or Tacks of the ſame Lands to himſelf and his Heirs; theſe Rights will accreſce to that ſpecial Heir to whom the Land was provided; for, it is not preſumable, that a Man would give the Lands to one, and the Rights of them to another Heir.

25. WHEN Women ſucceed, all theſe of one Degree ſucceed equally; and, becauſe the Eſtate is divided amongſt them, they are called *Heirs Portioners*, the eldeſt not ſecluding the reſt, and having no Advantage over them: But, where the Rights are indiviſible, ſuch as *Titles*, *Juriſdictions*, *Superiorities*, and all the Caſualites of theſe Superiorities, ſuch as *Ward*, *Marriage*, *Nonentry*, *Feu-duties*, &c. theſe fall all to the eldeſt *Heir Female* without Diviſion, Heirs Portioners.

Book III. Diviſion, together with the principal *Meſſuage*, it being a *Tower* or *Fortalice*; for other Houſes are divided equally (*b*).

26. All theſe *Heirs* are liable for their Predeceſſor's Debts, *in ſoildum*, if they once enter *Heir*, except *Heirs Portioners*, who are only liable *pro Rata*; and *Heirs ſubſtitute* in a Sum, who are only liable to Creditors in the Value of the Sum to which they are ſubſtitute. But, they have in *Scotland* a Privilege, which they call the *Benefit of Diſcuſſion*, whereby the Heirs of Line muſt be firſt purſued to *fulfil the Defunct's Deeds*, or *pay his Debts* (*c*): And next to theſe, the *Heir of Conqueſt*, the *Heir's Male*, the *Heir of Tailzie*, and *Heirs of Proviſion*. But for fulfilling a Deed relating to particular Lands, the Heir who ſucceeds in theſe particular Lands muſt be firſt purſued without *diſcuſſing*; and that which is meant by *Diſcuſſing*, is, *that the Creditor muſt proceed by Horning, Caption, and Appriſing or Adjudication againſt the Heir*; who is to be *diſcuſſed* before he can reach the other Heirs.

Benefit of Diſcuſſion.

27. An

(*b*) The elder Siſter gives to the other Heirs Portioners, a Recompence, for ſuch of the incorporeal and indiviſible Rights, that carry a corporeal Fruit or Income, but not for theſe that are purely Honorary, as Titles of Dignity, Juriſdiction, &c.

(*c*) They have alſo a Privilege to enter Heir *cum Beneficio Inventarii*: For which, ſee the Notes on § 30. *i*. *h*.

Tit. 8.

27. An *Heir* is ſaid with us to be *Heir active*, who is ſerved *Heir*, and may *purſue*; whereas he, whom the *Law* makes liable to be *Heir*, is ſaid to be *Heir paſſive*: As, when the *apparent Heir is infeft*, upon a Precept of *Clare Conſtat*, by the *Superior*, or otherwiſe meddles with his *Father's Eſtate* (*d*). Heir active. Heir paſſive.

28. When the *Predeceſſor dies*, he who ſhould be *Heir*, (and therefore is called *apparent Heir*) has Year and Day allowed him to deliberate, *whether he will be Heir*; which is called *Annus deliberandi* *; and which is indulged by the Law, becauſe, if a Man enter once Heir, he is liable to all the Debts, though *far exceeding the Eſtate*; and within that Year he cannot be purſued, nor obliged to enter; but after the Year is expired, the *Creditor* may *charge him to enter Heir*; and, if he reſolve not to enter, he muſt renounce any *Right* he has by a *Writ under his Hand*. Apparent Heir. * Annus delib. K. Ja. VI. Parl. 23. Act 27.

29. This Year is compted from the *Defunct's Death*, except in a *poſthume Child*, who has a Year allowed him after his Birth, and not only during this Year, but after it expires, the *apparent Heir*, without inſtructing any Title, may purſue for *Exhibition of all Rights made to his Predeceſſors*, and Poſthume Child.

(*d*) An apparent Heir, may be within this Year charged to enter Heir in general, within 40 Days, which do not commence, till the *Annus deliberandi* be fully expired.

and of all Rights made by his *Predeceſſors* to any in his own *Family*, (but not to *Strangers*) to the End he may deliberate, whether he will enter *Heir* (e). The apparent Heir may alſo defend his *Predeceſſor's Right*, and continue his Poſſeſſion, by purſuing for *Mails* and *Duties*, though he renounce. *Vide ſupra Book II. Tit. 9. § 45.*

30. If the *apparent Heir* reſolves to *enter Heir to his Predeceſſor*, he muſt raiſe *Briefs* from the *Chancellary*; which *Brief is a Command from the King* to the *Judge Ordinary* where the Lands ly, to cauſe try by an Inqueſt, conſiſting of 15 ſworn Men, whether the *Raiſer of the Brief* be *neareſt Heir*; And this is executed or proclaimed at the *Market Croſs* where the Lands ly; and, if at the Day appointed, the *Inqueſt* find him to be the next Perſon who ſhould ſucceed, they *ſerve him Heir*, by a Paper which is called a *Service*, and which being returned by them to the *Chancellary*, there is a *Writ* given to the Heir; and which is called the *Retour*, becauſe it is their Anſwer and Return to the *Chancellary of the Points* contained in the *Brief*: and thereafter, the Perſon who is ſerved Heir, if the Lands hold of the Crown, is infeft by Precept forth of the *Chancellary*; which Infeftment muſt be given by the *Sheriff* or his

(e) By *Act 24. Parl. 1695.* it is declared, *That apparent Heirs may bring their Father's Eſtate to a Roup, whether Bankrupt or not.*

his *Deputes*, and the *Sheriff Clerk as Notar* thereto: And, if the Service was to any *particular Lands*, it is called a *ſpecial Service*, which can be expede before no other Judge, than the *Sheriffs* or *Macers* to the *Seſſion*; but, if there was no *Land* deſigned, it is only called a *general Service*: And this general Service may be before any Judge, and is ſufficient to eſtabliſh a *Right to Heritable Bands, Diſpoſition, Reverſions, Juriſdictions*, and all other Rights whereupon the *Defunct* was not infeft, nor needed to be infeft; and a ſpecial Service of one who is Heir of Line, includes a general Service, but not *e contra* (*f*). Tit. 8.

31. The

(*f*) By *Act* 24. *Par.* 1695. it is ſtatuted, 'That any apparent Heir ſhall have Liberty to 'enter to his Predeceſſors *cum Beneficio Inventarii*, or upon Inventary, as Uſe is in Executry, 'allowing him to deliberate Year and Day in 'which he may make up an Inventary, which 'is upon Oath to be given up, full and particular, in all Lands, Houſes, Annualrents, 'or other heritable Rights whatſoever, to 'which the apparent Heir may ſucceed, to be 'ſubſcribed by him before Witneſſes, and given 'in to the Sheriff-Clerk of the Shire, where the 'Heritage lies; or, if the Defunct had no 'Lands or others requiring Saſine, it is to be 'given to the Clerk of the Shire, where he deceaſt. Which Inventary, the Sheriff, or Sheriff-Depute, with the Clerk of the Court, 'ſhall alſo ſubſcribe in Judgment, and record 'it in their Books, and give Extracts thereof; 'all which is to be done within the *Annus Deliberandi*;

General Brief.

31. The *general Brief* hath only two *Points* or *Heads*, viz. if the *Defunct* died at the *King's Peace*, and, if the Raiſer of the *Brief* be the next Heir; but the *ſpecial Brief* has *ſeven*, viz. when the *Defunct* died. *Secundo*, If he died laſt *veſt* and *ſeiſed* at the *King's Peace*. *Tertio*, That the *Raiſer is next Heir*. *Quarto*, Of whom the Lands are holden *in capite*. *Quinto*, By what Manner of Holding. *Sexto*, What is their *old and new Extent*. *Septimo*, Whether the *Raiſer be of lawful Age*, and in whoſe Hands the Lands are at preſent, and ſince what Time.

32. Sometimes likewiſe the *Vaſſal*, without ſerving himſelf *Heir*, gets a *Precept*

liberandi; And thereafter, the foreſaid Extract of the Inventary, ſhall within Forty Days after the ſaid Year and Day, be preſented and regiſtred in the Books of Council and Seſſion, in a particular Regiſter, to be appointed for that Effect." And it is by that Act declared, "That an apparent Heir entering in this Manner, ſhall only be liable for his Predeceſſor's Debts and Deeds *ſecundum Vires Inventarii*, *i. e.* to the Extent of the Subject in the Inventary.

"If any Part of the Predeceſſor's heritable Eſtate ſhall be without Fraud omitted in the Inventary, and ſhall not in the mean Time be affected by Creditors, the apparent Heir hath Liberty, ſo ſoon as it comes to his Knowledge, or within Forty Days thereafter, to add and eik the ſame to the firſt Inventary; which Addition is to be made, ſubſcribed, given in, and recorded in the Manner above preſcribed.

cept of Sasine from the *Superior*; wherein, because the *Superior* declares, *That it is known to him, that such a Man is Heir to his Father*, it is therefore called, a *Precept* of *Clare Constat*; which therefore makes the Obtainer liable *passive* to all his *Predecessor's Debts*, but gives him only *Right active* to the *particular Lands* contained in the *Precept*; nor will it give him a Right even as to these Lands, except against those who derive Right from the *Superior* who gave it, or otherwise acknowledge his Right. Tit. 8.

33. BAILIFFS also of *Burghs Royal*, do *infeft* their *Burgesses in Burgage Lands* *, by giving them *Sasine as Heirs*, and delivering them for a *Symbol* the *Hasp* and *Staple of the Doors*; and the *Sasine in that Case* is in Place of a Service, as to these Lands; but is not in other Cases a sufficient *active Title*: And these *Sasines* must be given by the *Bailiffs*, and the *common Clerk* of the *Burgh* as *Notar*, otherwise they are null. *K. J. VI. Par. 1. Act 27.

34. THE *Heir* who is *retoured*, holds either his Lands of the *King*, and then he gets *Precepts out of the Chancellary*, to the *Judge Ordinary* to *infeft* him; which if he refuse, the *Lords*, upon a Supplication, will order the Director of the *Chancellary* to issue out *Precepts* directed to another, who is thereby made a *Sheriff in that Part*: But, if the Lands hold of another *Superior*, then either that *Superior* is himself entred, or

not; if he be entred, he will be charged by *four Consecutive Precepts* to enter the Heir; and, if at last he disobey, his immediate Superior will be charged, and so, till the *Heir arrive* at the *King*, who never refuses to enter any; and, if the *Superior* be not entred, he must be charged upon *forty Days to enter*, that being himself entred, he may enter his *Vassal*; and, if he refuse or delay, he loses all the *Nonentries* of his *Vassal*, during his Life; but no other Casualities, because *quoad* these he was not *culpable*.

35. THOUGH the Person, who should be Heir, do not enter to his *Predecessor's Heritage*, yet he may be made liable to his Predecessor's Debt, by two *passive Titles* relating to *heritable Rights*; viz. *Gestionem pro hærede*, and, *as Successor titulo lucrativo post contractum debitum*. And there is a third *passive Title* relating to Moveables, which is called *vitious Intromission*.

Behaving as Heir.

36. BEHAVING *as Heir*, or *Gestio pro Hærede*, is, when the Person who might have been *Heir* immixes himself, and intromets with either the *Moveable Heirship*, or any heritable Estate belonging to the *Defunct*; in which Case, he is liable to the Creditors, not only according to the Value of what he intrometted with, but as far, and in the same Manner, as if he had been entred *Heir*; and yet the Lords will not sustain this *passive Title*, because of its extraordinary Hazard, where the Intro-

Intromiſſion is very ſmall, or, where he has colourable Title, to which he might aſcribe his *Intromiſſion*, as a *Factory* from the *Compriſer*, or the *Donator* to the *Eſcheat* or *Recognition*; *Geſtio pro Hærede*, being *magis animi quam facti*, which *Factories* will defend, though there was no *Declarator*: But, if the *appearand Heir* had no *Factory*, it is not ſufficient to alledge the *Defunct* died Rebel, and ſo could have no *Heir*, except his *Eſcheat* was declared before intenting the Purſuer's Action; nor will this *paſſive Title*, nor *vitious Intromiſſion* be ſuſtained beyond *ſimple Reſtitution*, except they be purſued in the *Intrometter's* own Lifetime, they being Kinds of *Delicts*. But he will not be liable, if the *Defunct's Right* was reduced, though after his Intromiſſion; and, ſince this *paſſive Title* was introduced by the Lords of Seſſion, in Favours of the *Creditors*, to deter *apparent Heirs* from *fraudulent Intromiſſion*; therefore, an *appearand Heir* paying his Predeceſſor's Debt, will not infer this *paſſive Title*, ſince that is for the Advantage of *Creditors*; nor will the getting of Money for ratifying a *Compriſing* that is expired, infer this *paſſive Title*, ſince the *Creditors* would have got no Advantage by that Right: But, if the *appearand Heir* had conſented before the *Compriſing* was expired, it would be a *paſſive Title*, becauſe, as Heir, he might have redeemed the *Compriſing*;

Tit. 8.

priſing; and if an *appearand Heir* grant Bond to a confident Perſon for his own Behoof, and that confident Perſon *compriſes* or *adjudges* the *Heritage* thereupon, his *Intromiſſion*, by Virtue of that *Appriſing*, will not defend him * againſt this *paſſive Title*, whether the Legal be expired, or not; but he will be liable, as if there were no ſuch Right in his Perſon.

* Act of *Sederunt*, 28th *Febr.* 1662.

37. Succeſſor *titulo lucrativo* is, where the *appearand Heir*, to preclude the Neceſſity of entring *Heir*, and ſo being liable to the *Creditors*, gets a *Diſpoſition* from him, to whom he would have been *Heir*, without any *onerous Cauſe* (g); the

Succeſſ. tit. lucrativo.

(g) By Act 24th, *Parl.* 1695, it is ſtatuted, That any, who, ſince *January* 1. 1661, is ſerved Heir, or by Adjudication on his own Bond, hath ſucceeded not to his immediate Predeceſſor, but to one Remoter, as to his Goodſire, by paſſing his Father and the like, ſhall, for the Debts and Deeds of the Perſon interjected, who was three Years in Poſſeſſion of the Eſtate, to which he is ſerved, be liable in ſo far as extends to the Value thereof, deducing the Debts already paid, with this Order for the Time paſt, That all Debts of the apparent Heir entring, as ſaid is, already contracted, ſhall, with the true and real Debts of the Predeceſſors to whom he enters, be in the firſt Place preferred. (But this is alter'd in Part, and explain'd by Act 11. *Parl.* 1696. which ſee.)

By that Act 1695. It is further ſtatuted, That where Rights or legal Diligences affecting their Prede-

the receiving whereof, though it be a ſmall Part of the Eſtate, makes him liable to the Payment of all the *Creditor's Debt*; if the Right made, as well as the *Infeftment*, was poſterior to the *Creditor's lawful Debt*. But, if there be an *onerous Cauſe*, then either it is not near equivalent to the Value of the *Lands diſponed*, and in that Caſe, it will not defend againſt this *paſſive Title*: Or, if it be near to the *Value*, it will defend againſt it, but not againſt *Reſtitution*, Tit. 8.

'*Predeceſſor's* Eſtate, ſhall be found ſettled in the 'Perſon of any ſuch near Relation, to whom the '*apparent Heir* to the foreſaid *Predeceſſor*, may al'ſo ſucced as Heir, the apparent Heir poſſeſ'ſing, by Virtue of the ſaid Rights and Diligences, 'except upon lawful *Purchaſe* by publick Roup, 'as ſaid is, ſhall not only be a paſſive Title, but 'the ſaids Rights and Diligences in the Perſon 'of the ſaid near Relation, ſhall only be ſu'ſtained as valid, to exclude the Predeceſſor's 'Creditors, in ſo far as can be qualified and 'inſtructed, that theſe Rights and Diligences 'were truly and honeſtly purchaſed for Pay'ment of Sums of Money, and no further.

'It is likewiſe provided by the ſame Act, 'That 'if an apparent Heir entring *cum Beneficio In'ventarii*, ſhall, before his giving in the Inven'tary, recording and taking Extract thereof, 'in Manner preſcribed by that Law, have In'tromiſſion with the Defunct's heritable Eſtate, 'other than what is neceſſary, *i. e.* for Cuſtody 'and Preſervation, or ſhall omit out of the In'ventary, any Thing he ſhall be found to have 'intrometted with, or poſſeſſed: In either of 'theſe Caſes, he loſes the Benefite of the Inven'tary, and becomes univerſally liable.

of that *Value*. And, since this *passive Title* overtakes such as might have been Heirs; therefore, a Disposition granted to a *Grand-child*, will make him *Successor Titulo lucrativo*, though the Father be alive, since, by the *Course of Succession*, he might in Time have been Heir, though he was not immediate Heir: But, since this can only reach *appearand Heirs*; therefore, a Disposition made by one Brother to another, though the Maker had no Children, will not make him *Successor titulo lucrativo*, since the Brother might have had Heirs himself; and so his Brother was not his *appearand Heir*.

38. This *passive Title* holds only in Heritage; and therefore the *getting a Right to moveable Heirship and Tacks, will not infer the same*.

39. Gestio *pro Hærede*, and *Successor titulo lucrativo*, being *passive Titles*, whereby, *in odium* of the Irregularity of the Intromission, they are made liable as Heir; therefore these *passive Titles* can extend no further, than if they intromet with, or take a *Disposition* to these Things, to which they might have succeeded, and so not inferred against an Heir of *Tailzie*, intrometting with, or getting a Disposition of what would have fallen to the Heir of Line; nor can they be extended further, than if they had been served Heirs: And thus an Heir-portioner will be no further liable

liable in these than *pro Rato*, if she had entred; for the Copy should go no further than the Original. Tit. 8.

40. To conclude the Succession in Heritage, it is fit to know, that by an *old Statute* *, and our *constant Practick, a Man cannot dispone his Heritage upon Death-bed in Prejudice of his Heirs*; (that is to say, neither Lands, nor Heritable Bands, nor any Band though moveable, in so far as his Heritage may be thereupon *appriſed* or *adjudged*, can be then disponed); so jealous was our Law of the Importunity of *Churchmen* and Friends, and of the Weakness of Mankind under such Distempers: And therefore, if a Man has made any Right in Prejudice of his *Heir*, after contracting Sickness, though he was found enough in his Judgment for the Time, and continued found for a very long Time; yet this Right will be reduced, as done *in Lecto*, or upon *Death-bed*, either at the Instance of the *appearand Heirs*, or at the Instance of the *appearand Heir's Creditors*: And it is sufficient to prove, that he was sick incontinently before the Disposition quarrelled, without proving that he died of that Sickness, or was sick the very Time of the Disposition.

* Statute Will. Reg. cap. 13. Rights on Death-bed.

41. If thereafter the Maker of such a Right *come to Kirk or Market unsupported*, the Law presumes, that the Maker was *reconvalesced*, and so the Deeds *reconvalesce*

with him: But, since the Law has fix'd upon *Kirk* and *Market*, as open Places, where the Disponer may be seen by all Men, and by unsuspect Witnesses; *Equivalent Acts*, as going to make Visits, though at a greater Distance, will not be sustained. But, though a Man cannot grant a new Right upon *Death-bed*, yet he may perfect an old Right, or do a Deed to which he might have been otherwise compelled, as for Payment of his Debt; or may grant a rational Jointure to his Wife (*b*), though he cannot grant Provisions to his Children in that Condition. And all Deeds done with the Consent of his Heir are valid; because this Law is introduced in Favours of Heirs, whether they be *Heirs of Line*, *Male*, or *Tailzie*, or *Provision*. TIT.

(*b*) One may grant to his Wife, not only a Jointure out of his Lands not exceeding her Terce; but also a Dowry greater than it, if he was, by Writing in *Liege Poustie*, bound to give it.

For clearing Questions arising concerning Deeds upon Death-bed, by Act 4th, Parl. 1690. it is ordained "That it shall be a sufficient Exception "to exclude the Reason of Death-bed, as to all "Bonds, Dispositions, or other Rights to be "granted by any Person after Sickness, That he "the Granter lived Threescore Days after mak-"ing of these Deeds, albeit, during that Time, "he went not to Kirk or Market. And,

"This is without Prejudice to reduce these "Rights; for this Reason, That the Person was "so affected by the Sickness, at the Time of "granting them, that he was not of sound "Judgment and Understanding.

TIT. IX.

Of Succeſſion in Moveables.

THE ſame Rules are obſerved in the *Succeſſion of Moveables*, that were formerly ſpecified in the *Succeſſion of Heritage*, except as to theſe Particulars, *viz.* All of one Degree ſucceed equally; and ſo among *Brothers* and *Siſters*, the *Elder ſecludes not the Younger*, nor *Males* the *Females*, as in *Heritage*: And in *Moveables* there is no *Right of Repreſentation*, as in *Heritage*; and therefore, if there be a Brother and two Siſters alive, and a third Siſter's Children, the Brothers and Siſters who are living will ſucceed equally, excluding the Children of the Siſter who is dead (*a*)

2. A *Teſtament* or *Latter Will*, does require to be in Writ; for *Nuncupative Teſtaments* (which were ſo called in the *Civil Law*, becauſe the Defunct named his Heirs without Writ) are not allowed by our Law Teſtaments.

(*a*) Whole Blood is preferred to half Blood, wherefore a Brother-German, or his Deſcendants, are preferred to a Brother Conſanguinean, and as in Heritage ſo in Executry, there is no Succeſſion competent to the Mother, or to her Blood. *Stair's* Inſtit. Lib. 3. Tit. 4. §. 34. 35. *Aliter* Sir *Thomas Hope* in his Minor Practicks, Tit. 3. §. 16.

Book III. Law (*b*), by which a Teſtament muſt either be Holograph, all written with the Defunct's own Hand; or at leaſt ſubſcribed by him before two Witneſſes, if he can write; or if he cannot write, by a Notar or Miniſter and two Witneſſes.

3. No *Heritable Right* can be left in Teſtaments, though the *Teſtator* was in *Liege Pouſſie*, or perfect Health: And though the Teſtament be made in other Nations, where *Heritage* may be diſponed by *Teſtament*; yet it will not tranſmit a Right to *Heritage* lying in *Scotland*; and yet a Teſtament made according to the Solemnities of theſe Nations will be valid in *Scotland*; for though they may regulate us as to *Solemnities*, yet they cannot alter the Nature, and ſo not the Tranſmiſſion of our Rights.

Legacy. 4. A *Legacy is a Donation left by the Defunct in any Writ, to be paid by his Executor*: But if the *Legatar* die before the *Teſtator*, or before the Condition is fulfilled, on which the *Legacy* was left, then the *Legacy* evaniſheth; and though neither other Mens Moveables, nor a Man's own Heritable Rights can be left in *Legacy*, yet

(*b*) A Nuncupative Legacy, within 100 l. *Scots*, is of Force in *Scotland*.

The written Teſtament to be ſign'd by a Notary, muſt be read to the Teſtator, in Preſence and hearing of the Notary and of the Witneſſes, who muſt hear the Teſtator declare it to be his Latter-Will.

yet such *Legacies* are valid, if the *Testator* knew that the Sum left was Heritable, or belonged to others; and the *Executor* in those Cases must pay the Value. Tit. 9.

5. A *Minor* being *Male*, and above 14 Years of Age, and a *Female* after 12 compleat, may make a Testament, without the Consent of their Curators; but under that Age they can make none. A Wife may make a Testament, without the Consent of her Husband. And a Person interdicted, without the Consent of the Interdictors; but Idiots nor furious Persons can make none, except in their *lucid Intervals*; nor Bastards, except they be legitimated, or have Children of their own.

6. If a Man be married, the Wife has without Paction, *a Share in his Moveables*, of which he cannot *defraud her by his Testament*; and this is called *Jus Relictæ*: And if there be Children, the Law has provided a Portion of the Moveables for them, which is therefore called their *Legitim*, and of which their Father cannot prejudge them by his Testament, but there is no *Legitim* due by the Mother's Death; nor have Children who are *Foris Familiat*, that is to say, *Who are married, and have renounced their Portion Natural*, any *Legitim* due to them. Jus Relictæ. Legitim.

7. This *Legitim* is due to immediate lawful Children only, and not to Grand-Children.

8. The

Dead's Part.

8. The Remainder of the Defunct's Moveables, beſide what is due to the Relict and Children, is called the *Dead's Part*, and upon that only he can diſpone.

9. If a Man have no Wife nor Bairns, all is the Dead's Part, and may be diſponed by him: If there be either Wife or Bairns, and not both, then the Defunct's Teſtament receives a *Bipartite Diviſion*; but if there be both Wife and Bairns, then it receives a *Tripartite Diviſion*.

10. By the *Civil Law*, a *Teſtament* was null if the Heir was not named; but with us a *Teſtament is valid though the Executor be not named*, who is the Heir *in Mobilibus*, and is called *Executor*, becauſe he *executes and performs the Defunct's Will*.

Executor.

11. By our Law, Relicts and Children dying after their Husbands and Fathers, but before Confirmation of their Teſtaments, do tranſmit their Intereſt in the *Defunct's Moveables* to their neareſt of *Kin*, *viz.* the Children, their *Legitim*, or *Bairns Part*, and the Relict her Share of the *Moveables*; the *Bairns* alſo, as neareſt of Kin, have Right to the whole *Dead's Part*, and the *Executor*, not being neareſt of *Kin*, muſt compt to them therefore, retaining only a Third of the Defunct's Part, which is allowed to him for executing the *Teſtament* *, (if he be *Executor nominate*, for an *Executor Dative* gets no Allowance) and if there be a Legacy left to the

* K. J. VI. Par. 22. Act 14.

the *Executor Nominate*, it is imputed in Payment of his Third; but the Dead's Part, whether falling to Children, or to the other neareſt of Kin, failing Children, is not tranſmitted without *Confirmation*; for both the Relict's Part, and Childrens *Legitim* ariſe by the Death of the Father or Husband, and ſo needs no *Confirmation* or other *Conſtitution*: But the neareſt of Kin's Right is by Succeſſion, and conſequently requires *Confirmation* for eſtabliſhing it, without which it cannot be tranſmitted to their *Executors*; for as an Heir in Heritage muſt be entred, otherwiſe he cannot tranſmit his Right, ſo neither can an Executor, without *Confirmation*, tranſmit his Right; *Confirmation* being the only *Additio Hæreditatis in mobilibus*: And as without *Confirmation* the neareſt of Kin could not be liable *Paſſive* in Payment of the Defunct's Debts, ſo neither could he without it have *Right active*. Children have Right to their *Legitim*, except they be ſecluded therefrom, either by their own *Renunciation*, or by accepting a Proviſion in full Satisfaction of all that they can crave as their Portion Natural, or Bairn's Part of Gear: And in either of theſe Caſes they are *foris familiat*, and out of the Family, and ſo have no Share with the Bairns remaining in the Family: And therefore, if Children get Bonds of Proviſion from the Father in his *Liege Pouſtie*, they Tit. 9.

they are not thereby excluded from their *Legitim*: Nor are they obliged to collate these Bonds of Provision, and to impute them as a Part of their Portion Natural; but they have Right to them as mere Creditors, and may likewise seek their *Legitim*. But if these Bonds of Provision were made to them upon Death-Bed, they cannot seek both the Provisions of these Bonds and their *Legitim*; for the Father, upon Death-Bed, cannot prejudge the Relict, nor the rest of his Children of their respective Shares, and consequently these Children, who are so provided upon Death-Bed, must collate with the Relict and rest of the Children †; but the Heir has no Share in the *Moveables*, except he collate, (*and be content that the rest of the Children share equally with him, in all that he can succeed to as Heir*;) or, in case there be but one Child; for then that Child is both Heir and Executor without Collation (*c*).

† K. J. VI. Par. 22. Act 17. Collation.

12. An

(*c*) It having been observed, that our Law was defective as to the affecting with legal Diligence, the moveable Estate of a Defunct, either for his own Debt, or for that of his nearest in Kin, as the Heritage may be reached in the known Manner: Wherefore, and to supply this Defect, it is by *Act 21. Parl. 1695*, statuted, That in the Case of a moveable Estate falling to a nearest in Kin, who lies out and does not confirm, the Creditors of the said nearest in Kin, may either require the Procurator-Fiscal to confirm and assign to them, under

12. AN *Executor Nominate*, is he who is named by th Defunct in his Teſtament, and is therefore likewiſe called an *Executor Teſtamentar*; but, if there be none named by the Defunct, then the Commiſſar will make an *Executor Dative*; and ordinarily they prefer the neareſt of Kin: But, if the neareſt of Kin, being charged, will not Confirm, then they name their own *Procurator-Fiſcal Executor (d)*; and if thereafter Tit. 19. § 8. Executor Nominate.

der the pain of his being liable for the Debt, if he refuſe; or they may obtain themſelves decerned Executors Dative to the Defunct, as if they were Creditors to him, with this Proviſion, *That the Creditors of the Defunct, doing Diligence to affect the ſaid moveable Eſtate, within Year and Day of their Debitor deceaſed, ſhall be preferred to the Diligence of the Creditors of the neareſt in Kin.*

It is by that Act alſo declared, *That in the Caſe of a depending Cauſe againſt a Defunct the time of his Deceaſe, the Purſuer may charge the neareſt in Kin to confirm Executor to the Defunct within 20 Days after the Charge given; which Charge ſo executed, ſhall be a paſſive Title againſt the Perſon charged, as if he were a vitious Intromitter, unleſs he renounce, and then the Purſuer may proceed to have his Debt conſtituted and the Hereditas Jacens of Moveables made liable by a Decreet Cognitionis Cauſa; upon the obtaining whereof, he may be deſerned Executor Dative to the Defunct, and affect his Moveables in common Form.*

(d) By *Act* 26. *Parl. July* 1690. "Commiſſars, "their Fiſcals, Clerks and Officers are diſcharged "to purſue or require any Perſon to confirm a "Teſtament, or give up the Inventary of the "Goods

Book III. after the neareſt of Kin compear, they uſe to *ſurrogate him*, and this is called an *Executor-Surrogate*.

Executor Creditor.

13. A Creditor may confirm himſelf *Executor Creditor*, and ſo may purſue the Defunct's Debitors; and leſt that Creditors ſhould wrong one another by *nimious Diligence*, our Law has appointed, that all who ſhall confirm themſelves Executors-Creditors, or ſhall do Diligence againſt *Executors* or *Intromitters* * within ſix Months after the Debitor's Deceaſe, ſhall come in *pari paſſu*.

* Act of Sed. 28. Feb. 1662.

14. Executors-Creditors are only obliged to confirm as much as may pay themſelves; and are for the ſame Reaſon *only*

" Goods of a Defunct, except at the Inſtance of " a Relict, Bairns neareſt in Kin, their Tutors, " or Curators, or of a Creditor.

As alſo, by that *Act* it is declared, " That " where ſpecial Aſſignations and Diſpoſitions are " made by a Defunct, tho' neither intimated nor " made publick in his Lifetime, they ſhall be " valid Rights, and give Titles to purſue or " defend, albeit the Sums of Money or Goods " thereby conveyed, be not confirmed, without " Prejudice to the Competition of Creditors, u- " pon their Rights and Diligences, as formerly. " Likeas, by *Act* 14. *Parl.* 1701. The Quots " of Teſtaments fallen due, ſince the aboliſhing " Epiſcopacy, in the Year 1689, are diſcharged " to be exacted by any of the Lieges; and any " Bonds given therefore, are declared void, &c.

only liable to do Diligence for what they did confirm. Tit. 9.

15. BECAUSE Moveables may be eaſily concealed from Creditors, or diſſipated; therefore the Law appoints, *that the Executor ſhall, upon Oath, give up Inventar, and find Caution to make theſe Moveables forthcoming*, and then the Commiſſar confirms him; nor can he purſue, or diſpone as Executor, till he be confirmed: He is only liable for the Defunct's Debt, in as far as the Goods confirmed will extend.

16. EXECUTORY being a mere Office, it accreſces to the Survivors; if there be moe Executors, and in ſo far as the Executors have not execute the Teſtament in their own Lifetime, that is to ſay, *Have not obtained Decreets for the Goods belonging to the Defunct*, there will be place for a new Executor, for executing theſe, and they are called, *Executors quoad non executa* (e): Or, if the Executor omit to give up any Thing in the Inventar, or do not give up the ſaids Moveables at the full Rates, there will be another Executor Dative appointed by the Commiſſars, who is called an *Executor Dative ad omiſſa vel male appretiata.*

R 17. THE

(e) A Teſtament is executed, not only by obtaining Decreet againſt the Debitors of the deceaſed; but alſo, by getting new Security, or, by aſſigning to one intereſted, the whole Executry.

17. The Executor only has Power of *Administration*; and the *Creditors* and *Legatars* can only pursue him, except where there is a *special Legacy left of such a particular Thing, or a Sum owing by such a particular Person*: For then the special *Legatar* has the *Dominium* transmitted to him, and so he may himself pursue for his special Legacy; but the Executor must be still called in the Pursuit, to the End it may be known, *whether the Debts exhaust the special Legacies*: For, no Legacy can be paid, till the Debts be paid; and therefore, if all the Legacies cannot be paid, the Legatar suffers a proportional Defalcation for Payment thereof; but if there be as much free Goods as will pay the special Legacy, there will be no Defalcation.

Special Legacy.

18. An Executor cannot dispone till he obtain a Sentence, but even the Sentence states him not in the absolute Right of the Moveables, otherwise than that he may discharge and assign to the respective Persons having Interest: For, if he were denounced Rebel, the Executory Goods, even after Sentence, would not fall under his Escheat, nor would his Executors, or his Creditors have Right thereto, in Prejudice of the nearest of Kin of the Defunct, to whom he was Executor.

19. If there be moe Executors, whom we call *Co-Executors*; one cannot pursue, unless

Co-Executors.

unleſs the reſt be either called or concurring, for all of them repreſent the Defunct only as one Perſon; but if any of the reſt will not concur, they may be excluded from their Office, by a Proceſs before the Commiſſars; nor can an Executor for the ſame Reaſon diſcharge a Debt wholly, ſince the reſt have an equal Share in each Debt: But, if the other Executors have got as much as their Share will extend to, a Diſcharge, even from one of the Executors, will be ſufficient: Nor are (for the ſame Reaſon) Co-Executors liable for the whole Debt, and ſo cannot be ſingly purſued, unleſs they have intromitted with as much as may pay the Debt purſued for. Tit. 9.

20. AN Executor is liable to do Diligence for recovering the Goods and Debts due to the Defunct, and which he has confirmed; the Diligence required upon his Part, is a Sentence, and regiſtrated Horning againſt the Defunct's *Debitors*; but, if there be an univerſal or ſpecial Legatar, whereby the Executor confirmed has no Advantage, then the Executor is not liable in Diligence, but only to aſſign the Creditors, that they themſelves may purſue. Diligence of Executors.

21. THE Executor likewiſe cannot pay any Debt without Sentence, leſt otherwiſe he might *prefer one Creditor to another*; but yet the Executor may pay thoſe

Debts that are acknowledged in *Testament* without Process, providing the same be paid before the Creditors intent a Pursuit: But these which we call *Privileged Debts*, may be paid at any Time, even after Process is intented at the Instance of other Creditors; because they are preferred to all others, *viz. Servants Fees, Medicaments on Death-bed, House-mail, and Funeral Expences* (*f*).

Privileged Debts.

22. After the Executors have executed the whole *Testament*, they may get a *Decreet of Exoneration before the Commissars against the Creditors, and all having Interest*; wherein they may prove, that all they got is exhausted by lawful Sentences; but it is not necessar to have such a Decreet when they are pursued before the Lords, for it is sufficient when they are pursued there, to alledge, *That they are exhausted by way of Exception.*

Decreet of Exoneration.

23. If any Person intromet with the *Defunct's Moveables*, without being confirmed, they are liable to the *Defunct's whole Debts*, whether they were related to him or not, though their Intromission was very small; and this was introduced to prevent the

Vitious Intromission.

(*f*) Servants Fees for one Year, or for a Term, as they have been hired; and an half Year's House Rent. Medicaments furnish'd from the Beginning of the Sickness whereof one died, to the Interment, *&c.* are reckon'd privileg'd Debts.

the *fraudulent and clandestine abstracting of the Defunct's Moveables, without Inventary, in Prejudice of Creditors* (g); And therefore this passive Title is only introduced in favours of Creditors, but of none others, such as Legatars, Bairns, *&c.* But if the Intrometter confirm before any Action be intented, this purges the *vitious Intromission*, and the Intrometter is only liable for the *Value of the Goods intromitted with*; or, if there be an Executor confirmed, no Person can be pursued as *vitious Intrometter*; for the Intrometter then is only liable to the Executor: But the Relict, or the Defunct's Children, confirming within Year and Day, after the Defunct's Death, do thereby purge the Vitiosity, though they Tit. 9.

(g) It being too notorious, That many Times, the neareſt in Kin of one deceas'd, embezils his Goods to the great Loſs of Creditors; and, when theſe Intrometters are purſued, they defend themſelves, by alledging, That before raiſing Proceſs againſt them, there is an Executor Creditor confirmed, to whom they're anſwerable, albeit the Thing intrometted with, be no Part of the Inventary in that Teſtament. For obviating this Fraud, it is by *Act* [illegible] *Parl.* 1696. ſtatuted, "That the neareſt in Kin, and others intrometting with the Moveables of any Defunct, who are not Executors confirmed to them, nor before Intromiſſion, have Right from the Executors confirmed, ſhall be liable as vitious Intrometters, notwithſtanding there's a third Party confirmed in a particular Debt, or Subject.

confirm not till after Citation; nor will necessar Intromission infer Viciosity; and that is called *necessar Intromission*, when either the Husband or the Wife continue their Possession of one anothers Goods, after one anothers Decease for Preservation; and that because there is no other Person to look after them; and this is for the *Advantage of the Creditors*, since it hinders the Goods from perishing.

24. If there be moe *vitious Intrometters*, they are each liable *in solidum*, if they be pursued in *several Actions*; and *pro virili*, if they be pursued together; but none of them get Relief, *for wrong in our Law has no Warrant*.

Relief, &c.

25. The Heir is obliged to relieve the Executor of all Heritable Debts, and the Executor is bound to relieve the *Heir* of all moveable Debts, as far as the *Inventar* will reach.

TIT. X.

Of last Heirs and Bastards.

Ultimus Hæres.

WHILST there is any alive, who can *prove even the remotest Contingency of Blood to the Defunct*, they succeed to him; but if there be none, the King succeeds as last Heir; for *quod nullius est*,

est

est Domini Regis; and so the King succeeds to the Defunct as last Heir, both in Heritage and Moveables, and is preferred to all Superiors and others whatsoever; for which End he makes a Donatar, who must obtain a *Declarator before the Lords of Session*, against all who are supposed to have any Relation: Whereupon a Decreet being obtained before the Lords, declaring *that the King has Right as last Heir*, the Defunct having died without any Relation, this Decreet is equivalent to a Service; but if Lands be taken by a Man to himself, and his *Heirs Male* simply, the King or other Superior will succeed as last *Heir*, if there be no Heirs Male, though there be Heirs Female, since the Land was not provided to them; and therefore Men ordinarily in their *Tailzies adject* the Clause, *which failing, to their Heirs whatsomever.* The King.

2. Because the King succeeds here as Heir, therefore he is liable to pay the Defunct's Debts; but he is only liable as far as the Estate will extend; and therefore the Creditors may adjudge the real Estate, and confirm themselves Executors-Creditors in the Moveables.

3. A Bastard, by our Law, has neither Heirs nor Executors; but yet he may dispone upon either his Heritage or Moveables in his *Liege Poustie*, though he cannot make a Testament, except he be legitimated by a Letter under the Great Bastardy.

Book III. Seal, (which extends not to Heritage) or have Children ſurviving him; for the Baſtard's Children will always ſeclude the King.

4. The King, in the Caſe of Baſtardy, makes a Donator, who purſues Declarator, and is liable to the Debt; for in effect the King ſucceeds here, *quaſi ultimus hæres*, and Creditors uſe the ſame Execution in this Caſe, as in the other; and in both *ultimus hæres*, and *Baſtardy*, the Relict has ſtill her Share of the Moveables, as in other Caſes.

5. Children procreated betwixt Perſons divorced, and theſe with whom they have committed Adultery, cannot ſucceed to them † (*a*).

† K. J. VI. Par. 16. Act 20.

(*a*) By the Act cited, Marriage between one who is divorced for his own Adultery on one Part, and the Perſon with whom that Crime was committed on the other Part, is null, and the Children begotten by ſuch unlawful Conjunction, are declared inhabile to ſucceed as Heirs to their Parents. To the like Purpoſe is Act 117. Parl. 1592.

THE

THE INSTITUTIONS Of the LAW of SCOTLAND.

BOOK IV.

TITLE I.

Of Actions.

HAVING finiſhed theſe two firſt Parts of the Law, which treat of *Perſons and Rights*: We come now to treat of the *Third Part*, viz. *Actions*, whereby theſe *Perſons* purſue theſe *Rights*.

Actions.

2. AN *Action* is defined to be a *Right of proſecuting in Judgment what is due to us*: And it ſuffers very many Diviſions; the firſt

Defin. of Actions.

Book IV. firſt whereof is, That ſome are Real, and ſome Perſonal. *A Perſonal Action is that, whereby we only can purſue the Perſon that is obliged to us*; as where I purſue a Man for Payment of a Sum due by his Bond. *A Real Action (a) is that, whereby a Man purſues his Right againſt all ſingular Succeſſors, as well as the Perſon who was firſt obliged.* As for Inſtance, if one have an Inſeſtment of Annualrent, he cannot only purſue the Granter for Payment of the Money by a *Perſonal Action*, but he can, by

Real and Perſonal Actions.

(a) A Real Action is that, which one who has a real Right in a Thing, or *jus in re*, raiſes before a Judge competent, againſt the Thing it ſelf, primarily, and againſt the Detainer or Poſſeſſor of it conſequentially, ſeeking that the Thing it ſelf be delivered to him, and that the wrongous Detainer may be ordained to give up to the Purſuer the Fruits and Profits of that Thing, which were *mala fide* intrommetted with. We give the Name of *Real Action*, to that which is allowed againſt Lands ſubjected to a Debt contracted by the Proprietary, called *debitum fundi*, competent to Superiors, Annualrenters, Liferenters, Annuitants, &c. who ſeek the Ground may be diſtrenzied, *i. e.* Fruits of the Land growing and extant, and Beaſts who get Suſtenance on it, &c. may be poinded *in valorem* of the Debt, without noticing any Right belonging to the Landlord, Poſſeſſor and Tenant, tho' the Proprietar muſt be called to Anſwer and Defend his Land from this Diſtreſs. See Book II. Tit. 8. § 14. and of this Title § 33. See Book II. Tit. 11. § 3. Book I. Tit. 7. § 16. *Supra.*

by a *Real Action*, called *an Action for Pointing of the Ground*, purſue all ſingular Succeſſors, and point the Tenants and Intromitters with the Rent, for recovering of his Annualrent out of the Land that ſtood affected with his Infeftment of Annualrent. But by the Civil Law, a Perſonal Action is ſaid to be that, which ariſes from a Perſonal Obligement, as a Real Action is that, which ariſes from a Real Right, and is founded *in Dominium* or *Property*, and competent againſt any Poſſeſſor or Detainer of what is ours, called likewiſe *Rei Vindicatio*. Tit. 14

3. Actions are alſo divided in ordinary Actions, and Actions reciſſory. For with us, all Actions are called *ordinary Actions*, except *Improbations*, whereby we purſue *Papers to be declared Falſe and Forged*; *or Reductions, whereby we purſue Rights to be declared null, and to be reduced*. Improbation and Reduction.

4. In *Improbations* there are two Terms given to produce the Writ, becauſe the Danger is great: And if the Writer and Witneſſes of and in that Writ be alive, *their Teſtimonies are only allowed as Probation*; which is called *The direct Manner of Improbations*: But if theſe be dead, the Lords try the Verity of the Writ by ſtrong Preſumptions and Conjectures, which is called, *The indirect Manner of Improbation*: But, becauſe in Reductions the Terms of Improbation. Direct Manner of Improbation. Indirect Manner of Improbation.

the Writ called for, is only to be declared null till it be produced; therefore, in these, there is only one Term granted for producing.

5. No Certification will be granted against any Writs made by the Pursuer and his Predecessors and Authors, except he be served Heir to these Predecessors, and produce a Right made by these Authors: But *Certification* will be granted against any Rights made to the Defenders or their Predecessors, to whom they may succeed *Jure Sanguinis*, or to their Authors, or to any to whom these Authors may succeed *Jure Sanguinis*; if any Person be called to represent these Authors.

Certification in Improbation.

6. The ordinary Reductions are *ex capite Inhibitionis*, whereby we pursue Rights to be declared null, as granted after Inhibition is raised by us; or *ex capite Interdictionis*, if granted after *Interdiction* is raised by us; or *ex capite viris & metus*, if the Rights were extorted from us by Force; or *ex capite fraudis*, if the Right were elicit from us by Circumvention: In both which last the Pursuer must libel the Qualifications or Circumstances from which the Force or Fraud are inferred; or *ex capite Lecti*, if the Deeds were done upon Death-bed, in Prejudice of an appearand Heir; or upon the *Act of Parliament* 1621 *, if the Deeds were done in *Prejudice of prior lawful Creditors, in Favours*

* K. J. VI. Par. 23. Act. 18.

vours of conjunct or confident Persons; that is to say, Relations or Trustees, without an onerous Cause; or to a Creditor, though for an onerous Cause, in Prejudice of another who had done prior Diligence, that was habile to affect the Subject disponed: All which, and many others of that Nature, are opposed to ordinary Actions; because they are extraordinary Remedies invented by Law, for the Preservation of Mens Rights, and are called *Extraordinary*, because they are never competent, till other ordinary Remedies fail. Tit. 1.

7. ACTIONS of *Reprobater* and *Error* are in effect *Reductions*, and must have the Concourse of the *King's Advocate*: In the first whereof, a Party, against whom Witnesses have deponed unjustly, craves the Decreet pronounced upon these Depositions to be reduced, because the Witnesses have deponed falsly, *circa initialia testimoniorum* (*b*); and condescends in his *Reasons of Reduction* upon the Particulars wherein they have deponed falsly; and also concludes, *That the Testimonies should be reprobated.* Reprobator.

(*b*) By *Initialia testimoniorum*, is understood, the Preliminaries to the Deposition or Testimony in the principal Cause, as the Age of the Witness; his State of being married or not; his being Rich or Poor; his Feud or Favour to any of the Parties, *&c.* See *Spotiswood*'s Form of Process in ordinary Actions, §. 125. 126, *&c.*

Summons of Error.

8. IN the *Summons of Error*, the Pursuer craves, That a Service (*whereby the Defender is served Heir to such a Man*) ought to be reduced; because the Pursuer is a nearer Relation to the Defunct than the Person wrongously served, upon which he condescends; and therefore concludes, *That the Service, and all following thereupon, may be reduced*; and that it may be found, *that the Inquest, who served him Heir, have erred*. And this is the only Summons that is drawn in *Latin* with us (*c*).

Actions Prejudicial.

9. SOME Actions are called *Preparatory* or *Prejudicial Actions*, because they must be discussed before other Actions are competent; As for Instance, if I pursue for a Sum, and the Defender raises an Improbation, alledging the Writ to be false, the Trial of the Falshood must be first discussed, and so is prejudicial to the Action of Payment.

Exhibitions.

10. EXHIBITIONS conclude either meerely to exhibite the Writ, or the Thing called for; and then it is only a *Preparatory Action*, such as Exhibitions *ad deliberandum*; or else they conclude Delivery: And in all Exhibitions the ordinar Terms libelled, are, that the *Defender had, has, or has*

(*c*) See *supra* Book III. Tit. 7. §. 8. with the Notes on it. The Convention of Estates, in *April* 1689, among the Grievances of the Kingdom, which wanted to be redressed, take Notice in *Art.* 5. of Assises of Error.

has fraudfully put away the Papers or Things craved to be exhibited (*d*); and therefore he is not obliged to exhibit, except he had them ſince the Citation, or fraudfully put them away, to elude a future Citation. Tit. 5. §. 3.

Actiones bonæ fidei.

II. SOME Actions are called *Actiones bonæ fidei*, in which Equity is followed, as Actions upon Mandates, Depoſitations, Emption, Location, *&c.* in which the Judge conſiders, what in Equity is to be done by one Party to another. And ſome Actions are *ſtricti juris*, in which the Judge is to follow the ſtrict Preſcript of the Contract upon which the Action is raiſed: As in a Declarator of Redemption, wherein the Purſuer craves, *That it may be declared, that he has lawfully redeemed the Lands that were wadſetted*; in which Caſe the

Actiones ſtricti Juris.

(*d*) The Lords of Seſſion conſidering the Inconveniency ariſing from the Depoſitions of Parties or Witneſſes, bearing in general Terms, That they had not, nor have not the Writings called for, Therefore by Act of *Sederunt* Feb. 22. 1688. They ordain, *That Parties ſhall be obliged to anſwer to all ſpecial pertinent Interrogators in Relation to their having of the Writs, or putting the ſame away, or as to their Knowledge and Suſpition by whom the ſame were taken away, or where they preſently are, that the Purſuer may thereby make Diſcovery, and recover the ſame; Declaring always, that upon adviſing the Defenders Oath, they ſhall not be otherwiſe direct againſt as Havers of the ſaid Writs, unleſs it be found, that they had the ſame ſince the Citation, or have fraudfully put them away at any Time.*

the Judge must consider the very precise Terms of Reversion, and that the Lands were redeemed conform to these Terms; nor is *Equipolency relevant* in these Cases.

Rei Persecutoria.

12. Some Actions are called *Rei Persecutoria*, by which we pursue that, *quod Patrimonio nostro abest*; which is commonly called *Damage and Interest*.

Penal.

13. Some are called *Penal Actions*, because *we pursue not only for Repetition and real Damage, but for extraordinary Damages, and Reparations by Way of Penalty*; such as are *Spulzies*, *Actions for violent Profits*, &c.

Arbitrary.

14. Some Actions are called *Arbitrary Actions, wherein the Judge is tied to no particular Law, but proceeds ex nobili officio*; that is to say, according to what he sees just and fit; as an Action for proving of the Tenor of an Evident, wherein the Complainer libels, that he had such a Paper, (of which he must libel the *full Tenor verbatim*) *and that he lost it by such an Accident; and therefore concludes, that the Tenor may be proven by Witnesses, and Adminicles in Writ*, which he must libel; for no Tenor can be proven, without some Adminicles in Writ: And, generally, there being many Things with which the Law behoved to trust the Discretion and Honesty of the Judge, since all Cases could not be comprehended under known Laws; it therefore invested the Judge with this eminent

eminent Power, which is called *nobile officium*, in Opposition to that *officium operarium & mercenarium*; wherein he is obliged to follow the *Will of the Contractors* precisely: *Et hoc officium mercenarium Judex nunquam impertit nisi rogatus.*

Declarators.

15. SOME Actions are called *Declarators*, because the Pursuer concludes in them, that some special Thing should be declared in his Favours; and ordinarily, whatever the *King*, or any other *Superior* grants a Gift, he to whom it is granted pursues a Declarator, *craving it may be found and declared, that the casuality gifted to him, has fallen in the Superior's Hands, and that he has Right thereto, by Virtue of the Gift.* And thus Declarators must be raised upon *Escheats*, *Marriages*, *Nonentries*, &c. only there needs no *Declarator upon a Gift of Ward*, and upon a Gift of Forefaulture sentenced by *Parliament*; but, if the Forefaulture be past before the Justices, the Gift must be declared. And on Gifts of *Escheat*, they sometimes raise Actions both of general and special Declarator in one Summons. In the general, the Pursuer concludes, that it should be found and declared, that the *Rebel was lawfully denounced to the Horn*; and that thereby his Escheat fell in the *Superior's* Hands: And in the special, he concludes, *that the Tenants of the Rebels* Lands, whose Escheat is fallen, may pay him the Mails and Du-

ties by *Virtue of his Gift, and Decreet of general Declarator*. But though this laſt Action be called *an Action of ſpecial Declaration*, it is in Effect, but an *Action of Maills and Duties*. In other Caſes alſo, where any Thing is craved to be found and declared, as a Right ariſing upon a ſpecial Matter of Fact, for which no other Action can be founded that has a ſpecial Name: *Lawyers* do now cauſe raiſe *Actions of Declarator*, or, at leaſt, cauſe adject Concluſions of Declarator to other Actions, ſuch as *Reductions*, &c. and theſe are the ſame with the *Actiones in factum*, mentioned in the *Civil Law*.

Civil Actions.

16. Some Actions are called *Civil*, *wherein Men proſecute their Civil Rights*; and ſome *Criminal*, *wherein Men proſecute Crimes, ad vindictam publicam*.

Nature of a Summons.

17. For farther clearing of Actions, and how they ought to be libelled; I ſhall briefly explain the *Nature of a Summons*, and ſhall ſet down ſome of theſe Actions, which have ſpecial Names and Concluſions.

18. The chief Parts of a Summons are the Purſuer's Intereſt or Title; that is to ſay, *the Right ſtanding in his Perſon*, whereby he has good Intereſt to purſue the Action he has intented.

19. Secundo, That all the Perſons, who ſhould be called as *Defenders*, be called in the Summons; and, ſince it is a relevant Exception againſt a Summons, that

that *all Persons having Interest are not called*. Tit. 1.
Therefore it follows clearly, that for the more Security, it is fit to call all Persons who may be concerned in that Process. Medium concludendi.

20. TACTIO, The *medium concludendi*; that is to say, *the Ground whereupon the Persons called are liable to pay and perform what is craved.*

21. QUARTO, After all this is narrated, the King, in the Summons, says, *Our Will is*, &c. that ye *cite such and such Persons*, &c. which is called *the Will of the Summons*, and which Will of the Summons does comprehend a Command to the *Messenger* to cite the *Defenders*; and expresses the Number of Days, upon which they are are to be cited, and the Place which they are to be cited, and before whom they should compear: *As also* the *Conclusion* craved by the Pursuer, each of which Summons almost has its own special *Stile* and *Terms*; and by *Act of Parliament*, *Writers* are commanded not to alter the *Antient Stile*. Will of the Summons. Conclusion. * K. J. VI. Par. 10. Act 13.

22. IT is observable, that though the *Matter of Fact* be ordinarily narrated before the Will of the Summons; yet *Summonses of Reduction, Improbation, Spuilzie*, and *Declarators of Nonentry*, begin at *Our Will is*, &c. and then go on to the Interest of the Pursuer, &c.

23. IN a *Summons of Transumpt*, the Pursuer (who in the Summons is always called the *Complainer*) libels, *that he has* Transumpt.

Rights to the Lands, whereof he craves the Papers to be transferred; and that therefore it is needful to him to have Doubles, and Transumpts of the Rights; and this is the Pursuer's Interest; and that the Defender hath these Rights, or is obliged to procure him Transumpts: And therefore concludes, that that the Defender should be obliged to exhibite and produce them, to be judicially transumed (e); and the authentick Transumpts to be delivered, as sufficient for the Security of the Pursuer in the said Lands, as the originals themselves, except in Improbation.

Multiplepoinding. A Summons of Multiplepoinding, the Complainer having narrated, that he is troubled by such and such Persons, who do each of them pretend Right to a Sum in which he is liable; he therefore concludes against all of them, to compear to hear and see it found, that the Party who shall be found to have best Right to be preferred

(e) By Act Parl. 1698. it is enacted, 'That it shall be lawful to Register for Conservation Charters granted by Subjects, Dispositions, Bonds, Contracts, Tacks, Reversions and all other probative Writs in any publick Authentick Register competent, albeit these Writs want a Clause of Registration, and that the Principal be given back to the Party, the Extract being admitted to make Faith in all Cases, except Improbation, as if the Writs had been by Virtue of a Clause of Registration duly registrated.

preferred, and the other Party to be discharged from troubling and molesting him in all Time coming.

25. In a Summons of transferring the Pursuer libels, that there was a depending Process, at the Instance of his Predecessor, whom he represents against the Defunct, whom the Debitor represents; which Process must be narrated *verbatim*. And, if the Pursuer's Predecessor be dead, craves that the Process be transferred *Active* in his Person, as representing the Defunct. And, when the Defender is dead, the same is transferred against his Representatives *Passive* (f). The Conclusion of Transferrences are, that such *Actions* may be competent to the Pursuer, as Heir to the Defunct, against the Representatives of the Defender, as was competent to the Pursuer's Predecessor; and that the said Action may go on, and be continued in the same Manner, as it would have done against

(f) By *Act* 15. *Parl.* 1603. it is statuted, 'That 'if a Pursuer happen to decease, during the De-'pendence of a Process at his Instance, there shall 'be no need for his Heirs, Executors, or Assig-'neys to raise a transferring *Active*, but that u-'pon Production of the former confirmed Testa-'ment, or special Assignation, the next intimate, 'they are allowed to insist in the principal 'Cause, in the same Way as their Predecessor, 'if still on Life, might have done, without Pre-'judice nevertheless to Transferrence *Passive*, 'conform to the Practique, as accords.

Book IV. against the Heirs, whom the Defender represents.

XII. The PREFERENCES are privileged Actions coming in upon six Days.

17. If any Person Subscriber of a Bond or a Contract be dead, the *Procuratory* consenting to the Registration expires (g); and therefore the Writ cannot be registrated, otherwise than by raising a Summons of Registration against the Representatives of the Granter, upon the passive Titles, in which the whole Tenor of the Writ craved to be registrated is set down *verbatim*; and then it is concluded, that the said Writ should *be insert*, and registrated in the Books of Council and Session for Conservation; and that Execution should be direct thereupon, in Manner mentioned in the said Writ; and that the said Representatives should be liable in Payment: But this Action is ordinarily supplied,

Summons of Registration.

(g) By the same *Act* 16. *Par.* 1698 it is declared, 'That all Writs registrable, may be registred after the Death of the Creditor, at the Instance of his Heir, Executor, or Assigney, as well as of before; and that upon Production of a Retour, in Case of Bonds or other Writs heritable, or of a confirmed Testament containing the Bond or other Writ, in Case they be moveable, or of a Special Assignation, tho' not intimate, in the Case of either; which Registration shall have the same Effect, both as to Prorogation and summar Execution, as if the Creditor were still on Life.'

supplied, by an ordinary Action for Payment.

28. In a *Summons of Prævento*, the Complainer narrates, that he having *raised Letters of Horning*, the same were *suspended upon most frivolous Reasons, to a very long Day*; and therefore concludes, that the *Defender should bring with him the said Suspension, the blank Day of Blank*, prævento termino, *to hear and see the same called, reasoned and discussed; with Certification that if he fail, the Lords will cause call the Suspension upon a Copy, and admit Protestation therein, and ordain the Letters to be put in farther Execution.* Prævento.

29. If an *Advocation* be raised to too long a Day of *Compearance*, there may be likewise a *Summons of Prævento* raised thereof.

30. In a *Summons of Contravention of Laborrows*, the Pursuer libels, that *A. B. became Surety* and *Laborrows* for *C. D.* that the Complainer's *Wife, Bairns, Men, Tenants and Servants, should be harmless and skaithless in their Bodies and Lands, &c.* And then subsumes upon the Prejudice done, notwithstanding of the said Caution: And therefore concludes, that both the *Principal and Cautioner* should be decerned to have contraveened the said *Act of Caution*, in Manner foresaid; and therethrough, that they *conjunctly and severally have incurred the foresaid Pain, the one Half* Contrav. of Laborrows.

to the King and his Treasurer, and the other Party to the Complainer, as Party grieved.

Parl. 6. Act 77. Parl. 13. Act 170. Parl. 7. Act 117.

31. In a *Declarator of Property*, the Complainer narrates his Right to the Lands, and how long, and after what Manner he and his Authors have been, by themselves, their Tenants, and others having Right from them, in the peaceable Possession of the said Lands, until of late, that he is molested and troubled by the Defender; and therefore concludes, that it should be found and declared, that he has the sole Good, and undoubted Right and Interest in and to the said Lands; and that therefore, the said Defender and his *Tenants, and Servants, and others of their causing and commanding, should be decerned not to trouble or molest them for the future, in their peaceable Possession, bruiking, and joysing thereof.*

Declar. of Property.

32. If the Complainer designs only to maintain his Possession, without bringing his Property in Controversy, he raises a *Summons of Molestation*: In which he only concludes, that *they should desist, and cease from troubling and molesting him in the peaceable Possession of his Lands.*

Summons of Molestation.

Poinding of the Ground.

33. In a Summons *for Poinding the Ground*, the Pursuer narrates, that he stands infeft and seised in an Annualrent of ... to be uplifted out of the Lands of A. and therefore concludes against the Tenants of these Lands; and the Heritor for

him Instantly to hear and see Letters directed to Messengers at Arms, Sheriff in that Part, to Charge, arrest, apprise, Compear, Found, and Distrainzie the readiest Goods and Gear that are presently upon the Lands, and yearly and termly in Time coming, during the not Redemption of the Annualrent.

34. In a Summons of *Spuilzie*, the King commands *Messengers*, &c. (which is the Stile of all Summonises) which begin with *Our Will* is, to *Summon*, *Warn*, and *Charge* the Defender to compear and answer at the Instance of the Pursuer, against whom the *Spuilzie* after specified was committed; that is to say, *the Defenders for their Wrongous, Violent, and Masterful coming by themselves, and their Servants, Complices, and others in their Name; of their Causing, Sending, Hounding out, Command, Reset, Assistance and Ratihabition to the Lands of B. upon the 5th Day of* (November, *and for their Wrongous, Violent, and masterful Spuilziation of the Goods* (to be condescended on) and then concludes, *that they should pay the Prices extending to and the Profits that the Complainer might have made of the said Goods daily, since the said Spuilziation, extending to* &c. Spuilzie.

35. In a Summons of *Wakening*, the Complainer, after narrating, that he had raised such a Summons, which he had suffered to ly over and sleep for a Year, (for there needs no *Wakening*, if there was Wakening

was any *Judicial Act*, or Minute upon the Summons within the Year) and therefore concludes against all the Persons cited in the first Summons, to hear and see the *foresaid Action called, wakened, and begun, where it last left, insisted into, and Justice administrated therein, till the final Decision of the Cause.*

Forthcoming.

36. A *Forthcoming* is that Action, wherein the Arrester libels, that he having raised *Letters of Arrestment*, he caused a *Messenger* lawfully fence and arrest all Debts owing by the *Defender* to his Debitor, to remain under Arrestment, and to be made forthcoming to him; and therefore concludes, that the *Defender* should be *decerned to make forthcoming Payment, and Delivery to the said Complainer, of the Sum of addebted, restand, and owand by him to the said Debitor.*

Breaking of Arrestment.

37. If, notwithstanding of the *Arrestment*, the Debitor pay his own Creditor; he will be liable to the Arrester, and will be forced to pay him what he was resting to his own Creditor, and likewise he may be pursued *for breaking of Arrestment*, wherein, after the Arrestment and Payment are narrated, the Pursuer concludes, *that the Defender should be decerned to have broken the Arrestment then standing, and not lawfully and duly loosed; and therefore to be punished in his Person and Goods, conforme to the Laws of the Realm, in Example of others**.

*K. J. VI. Par. 7. Act 118.

38. Though

38. THOUGH the *Accumulation of several Actions into one Libel* was not allowed by the *Civil Law*, yet it is allowed by ours; in which we may not only pursue several Persons, for several Debts, in one Libel, which we call by a general Name, *an Action against Debtors*, but we may likewise accumulate several Conclusions against one and the same Person, though they be of different Natures; as Reductions, Improbations, and Declarators of Property, and Actions of General and Special Declarator; in all which, it is a general Rule, *quot articuli tot libelli*. The Accumulation of Actions.

39. BUT, when many Actions are competent for one and the same Thing, as, if a Messenger be deforced, we may pursue the Deforcer criminally, (which will infer *Confiscation of Moveables*) *or civilly, for Payment of our Debt*; and the pursuing of the one does not extinguish, or consume the other; and either the Criminal or Civil Action may be first pursued; and in the Concourse of all Actions, if the Actions which concur have different Conclusions, as in the foresaid Instance, where the Criminal Action of Deforcement concludes Confiscation, and the Civil Action only Payment. Though the Defender be assoilzied in the Criminal Process, yet he may be pursued civilly, and the Deforcement referred to his Oath. Concursus Actionum. Deforcement.

TIT. II.

Of Probation.

Probation. FOR understanding the *Matter of Probation*, it is fit to know, that all *Probation* is either by Writ, by Oath, or by Witnesses.

By Writ. 2. PROBATION *by Writ*, has been formerly explained in the Title concerning *Obligations by Writ*.

By Oath. 3. PROBATION *by Oath* is, when either the Party or Judge *refers any Thing to the Oath of the contrare Party*; *but regularly*, no Man's Right can be taken away by Oath, except he who has the Right refer the same to the Adversary's Oath: But, when there is a former Probation already adduced, the Judge sometimes allows an *Oath of Supplement*, which is so called, because it is given to *supply the Probation* already led, when it is defective or unclear.

Oath of Supplement.

Oath of Calumny. 4. An *Oath of Calumny* (a) is that, whereby either the Pursuer or Defender is obliged to swear, that the *Pursuit*, *Defence*, *Reply*,

(a) See Stair's Form of Process in ordinary Actions, § 32, 33. Act of Sederunt Jan. 12. 1692, which gives the Terms of an Oath of Calumny; And further declares, *That a Party is not holden to give his Oath of Calumny* in facto proprio & recenti, *seeing upon the Matter that resolves into an Oath of Verity.*

Reply, &c. are not groundless; and that he believes, in his Conscience, the same to be just and true. And this may be craved by either Party at any Time, during the Dependence; and, if it be refused, the Pursuer will have no further Action, nor the Defender will not be allowed *to insist any further in the Defence, Duply*, &c. whereon his *Oath of Calumny* is craved. Tit. 2. K. Ja. I. Act 125.

5. An *Oath in Litem* is *that, which Law allows the Judge to defer to him who is injured, for proving the Quantities of the Thing wherein he is injured*; *V. G.* If I pursue *Titius* for having *broke up my Trunk*, and I having proved, *that he did break it up*, the Judge will refer to my Oath, what I had in the Trunk; and this is allowed both in *Odium* of him who commits the *Injury*, and lest the Person *unjustly injured* should lose his Right for Want of *Probation*. Oath in Litem. Probation by Witnesses.

6. A *qualified Oath* is *that, whereby he to whose Oath any Thing is referred, deponeth not simply, but circumstantially*, which we call *to depone with a Quality*; *V. G.* If I pursue *Titius* for Payment of a Bond, which he *promised to pay*, who compears and deponeth, That the Promise was conditional, and did depend upon Something to be done, or performed by the Pursuer, as that *in tuition* of the Promise the Pursuer was to make over some Right to him, or discharge some Obligation or Right standing in his Person: And those qualified Oaths gene- A qualified Oath. Probation by Witnesses.

rally

rally are admitted, if the Quality be intrinsick; that is to say, *necessarily implyed in the Nature of the Thing, or are a Part of the Promise*: As in the foresaid Instance.

7. But, if the Quality be extrinsick, it in Effect resolves in a Defence, and so must be proven otherwise than *by the qualified Oath*; as, if a *Debt be referred to the Party's Oath*, who depones, *that he acknowledges the Debt, but that the Pursuer is resting to the Deponent the equivalent Sum, with which he would compense the Sum pursued for.* This will not be admitted as a Quality, but is in Effect a Defence, which must be proven otherwise than by his Oath (*b*).

Probation by Witnesses.

8. Probations *by Witnesses*, having been allowed in all *Cases of old*, until the Falsness of Men forced our Law-givers to allow nothing above 100 *lib.* to be proven without Writ or Oath, and Promises to be only proven by Oath; this Probation by Witness, is therefore called *Probatio prout de Jure*; and it is fit to know, that none within Degrees defendant, *i. e.* forbidden, that is to say, who are Cousin-germans, or neater Relations, can be Witnesses; nor Women, nor Tenants who have not Tacks, nor Persons declared infamous, nor Domestick Servants, nor such as may gain or lose by the Cause, nor such

Inhabile Witnesses.

(*b*) See *Spotiswood's* Form of Process in ordinary Actions, § 77.

such as have given partial Counsel; that Tit. 1.
is to say, *Advice to rdise or carry on the Pursuit*; nor such as *have told what they will depone*, which we call *prodere Testimonium*; nor such as *compear to depone without being cited*, whom the Law calls *Testes ultronios*, and rejects them, because of their suspected Forwardness: All others except these may depone, and are called *habile Witnesses*; and, if *habile Witnesses* refuse to come when they are cited, there will be first *Horning*, and then *Caption directed against them*, which are called first and second Diligences, but their *Escheats* will not fall upon that Horning (*c*).

9. PRESUMPTIONS are a Kind of Probation, and a *Presumption is defined to be a strong Ground or Argument, whereby a Judge has Reason to think, or be convinced, that such a Thing is true*; and they are divided into *Præsumptiones Juris*, which, though they be strong, yet may be taken off by a contrary Probation; as, if a Man threaten to poison another, if the Person was thereafter poisoned, it is presumable, that he was poisoned by the Threatner: And *Præsumptiones Juris & de Jure ubi Lex constituit super Præsumpto*; and thus the Law presumes, that an *ultronious* Witness, who offers himself, is *partial*; and therefore statutes Presumptions.

(*c*) For further Explication of this Matter, see *Spotiswood's* Form of Process in ordinary Actions, from § 107, to § 131.

takes upon that Presumption, that he shall not be received; *and against these Presumptions no Probation can be admitted.*

TIT. III.

Of Sentences, and their Execution.

AFTER a *Decreet is* extracted, the *Obtainer thereof raises Letters of Horning thereon*, whereby the Party decerned is charged to pay or fulfil the Will of the *Decreet* under the Pain of Rebellion; and this Decreet can only be quarrelled by *Reduction* or *Suspension*, in both which the Reasons whereupon it is quarrelled are set down. Nor can a *Decreet of the Lords* be taken away without Reduction: And, if there has been a Debate in the first Instance, (for so we call the Action before the Decreet, as we call *Reduction* and *Suspension* the second Instance) then nothing that was competent to have been proponed before the Decreet will be admitted, but will be repelled as *competent and omitted*; for, else there should be no End of Debate. But yet if any Thing have newly emerged, or has newly come to the Party's Knowledge, these are, and must be received, if he depone that *he knew the same formerly.*

2. The

2. The ordinar Effect of a *Suspension* is, *to stop the Execution of Sentences for a Time*; and it is a *Summons*, wherein the Party, alledged injured by a Decreet, doth cite the Party who has obtained the Decreet *before the Lords*, (for no *Inferior Court can suspend*) to answer to the Reasons offered by him, for suspending Executions upon that Decreet: Which Summons proceeds upon a Bill, wherein the *Reasons* are *represented to the Lords*; for, though sometimes *the Lords ordain the Reasons to be debated upon the Bill*, yet ordinarily they ordain Letters of Suspension to be raised: If the Decreets be *in Foro*, then the Suspension must pass, by the whole Lords in Time of *Session*, and, by three Lords in Time of *Vacance*; but other Decreets may be suspended by any one Lord. The Suspension.

3. There are other Reasons allowed to be insisted on, beside these in the Bill, and these are called *eiked Reasons*; and a Man may suspend upon new Reasons, as oft as he pleases, for competent and omitted is not received against *Suspension* (*d*).

T But,

(*d*) It may be thought, that competent and omitted is relevantly proponed against Reasons of Suspension, as well as against Reasons of Reduction; especially, since the Act of *Sederunt*, *November* 20th, 1711. *appointing a Defender to propone his whole peremptory Defences together, at least, before a Report in the Cause or reclaiming against the Interlocutory of an Ordinary.*

But, if the Reason of Suspension be founded on Compensation, the same must be proponed in the first Instance, and before the Decreet be extracted *, otherwise it will be repelled as competent and omitted.

* K. J. VI. Par. 12. Act 141.

4. If the *Suspension* be called, discuss'd, and the Letters found orderly proceeded, that is, ordained to be put to farther Execution: Then Letters of Caption may be raised; whereby all the *Inferior Judges* and *Magistrates* are ordained *to concur with the Messenger in apprehending the Rebel, and putting him in Prison*: Which, if they refuse, or, if the Prisoner thereafter escape out of their Prison, *they are liable to pay the Debt*, by a *Subsidiary Action*.

5. Decreets are executed likewise by *Poinding* and *Arrestment*, upon the *Warrant in the Letters of Horning*, which are fully treated in their proper Places: *Vide supra, Tit. Poinding*, and *Arrestment. Tit. 6. Book III.*

6. As to *Execution of immoveable Goods*, which is by *Comprising* and *Adjudication*; the same is formerly treated, *Book II. Tit. 12.*

7. If the Decreet be to *remove from Lands*, then the Party decerned to remove, being denounced Rebel, for not removing, the Sheriff or Judge Ordinar is charged to eject, *who comes to the Land, and puts out the Fire*, or *calls out some of the Tenants*.

Letters of Ejection.

But

But, if a Man continue to poſſeſs *in Spite of all Law*, after he is legally ejected, the *Privy Council* will give *Letters of Fire and Sword to the Party injured*; commiſſionating the Sheriff, and others whom he will name, to *diſpoſſeſs him by the Sword, to raiſe Fire, and uſe all other Severities*; for which the Commiſſion does *indemnify them*. Tit. 3. Letters of Fire and Sword.

8. If ſuch as have *debateable Rights*, chooſe rather an *amicable*, than a *judicial Deciſion*, they ſubſcribe a *Submiſſion to Arbiters*, and, if they pleaſe, to an Overſman, and another *Blank* on the Back of the *Submiſſion*; wherein they may fill in their *Decreet Arbitral*: And, though it be free to theſe *Arbiters* to accept, yet, if they once accept, *the Lords will grant Letters of Horning to force them to decide*. Decreet Arbitral.

9. Though theſe *Arbiters* are not tied to the ſtrict *Solemnities of Law*, yet they muſt obſerve *material Juſtice*; and therefore they muſt *adverti ſe Parties, that they may give in Claims*, (for a *Claim* to *Arbiters* is in Place of *Libels to Judges*) and muſt allow Terms to prove: And though Equity is to them a Rule, as Law is to other Judges; yet, if either Party be enormly leſed, the Lords will ſuſpend and reduce their Decreets. If the Sumiſſion bear no ſpecial Day, betwixt and which they are tied to decide, they muſt decide within a Year of the Submiſſion; and if Witneſſes will not voluntarily appear before

them, the Lords will, upon a Bill, grant Letters of Horning to force them to appear, as they will againſt the Arbiters themſelves; if they refuſe or delay to decide, and to give forth their Decreet Arbitral (*e*).

10. ANOTHER ordinary Way now uſed is, that the one Party grants a blank Band, and the other a blank Diſcharge, to be filled up by the Arbiters, without any Submiſſion (*f*).

TIT. IV.

Of Crimes.

Crimes. CRIMES are either Private, where the Injury is committed againſt *Private Perſons*; or *Publick*, where it is committed immediately againſt the *Commonwealth*.

Delicta. 2. PRIVATE Crimes, called alſo *Delicta* in the Civil Law, oblige the Committers to repair the Damage and Intereſt of the private Party.

3. CRIMES are in *Scotland*, either puniſhed Captitally, by Death; or Pecunially

(*e*) By Act 25. *Regulat.* 1695. a Decreet Arbitral cannot be reduced for any Cauſe or Reaſon whatſoever, except Corruption, or Bribery, or Falſhood.

(*f*) See the Notes on Book III. Tit. 5. § 8.

ally, by a certain Fine; or Arbitrarily, at the Diſcretion of the Judge.

Capital Crimes are,

4 TREASON, which is puniſhed by *Forfaulture of Life, Lands, and Goods.*

5. IT *is Treaſon in any Man to plot, contrive, or intend Death or Deſtruction to the King's Majeſty; or to lay any Reſtraint upon his Royal Perſon; or to deprive, depoſe, or ſuſpend him* *; *or to endeavour the Alteration or Diverſion of the Succeſſion* †; *to levy War againſt the King, or any Commiſſioned by him; or to intice others to invade him* *; *to make Treaties or Leagues with foreign Princes, or amongſt themſelves without his Conſent* †. *To riſe in fear of War againſt the King; to raiſe a Fray in his Hoſt* *; *to aſſail Caſtles where he reſides* †, *to impugn the Authority of the three Eſtates; to decline the King's Authority; not to come out to the King's Hoſt,* or to deſert it *; to maintain or relet *Traitors* †; to conceal *Treaſon; to counterfeit the King's Coin; and to raiſe wilful Fire* *: *All which are Species of High Treaſon.*

6. WE have a Kind of *Treaſon* in *Scotland,* which we call † *Statutory Treaſon,* becauſe it is meerly introduced by Statute, and not by common Law, *viz.* Theft in landed Men *, becauſe of the Danger of that Kind of Theft; *Murder under Truſt* †; as if one Man ſhould Kill another, when he

Tit. 4. Treaſon.

* K. J. II. Act 24. K. C. II. Par. 1. Seſſ. 2. Act 12.
† K. C. II. Par. 3. Act 2.
* Par. 1. Seſſ. 2. Act 2.
† K. C. II. Par. 1. Seſſ. 1. Act 3. 5.
* K. J. II. Act 54. K. J. II. Act 24.
† K. J. VI. Par. 8. Act. 129. and 130.
* K. J. I. Act 4. K. J. II. Act 28. K. J. II. Act 28.
† Act 97. Par. 6.
* K. J. V. Act. 8.
† Stat. Treaſon. * K. J. VI. Par. 11.

† Ibid. Act 50. † Ibid. Act 51.

Book IV. he invites him to his Houſe; or a Tutor ſhould kill his Pupil, which, becauſe of the Eaſineſs and Atrociouſneſs of the Crime, is made Treaſon. *The fireing of Coal Heughs* *, *Aſſaſſination* †, *and the purſuing another for Treaſon without being able to prove it* *. *All Jeſuits, Seminary-Priests, and Trafficking Papiſts* †; *and all Thieves, who take Bonds from leal and honeſt Men,* for re-entering when they Pleaſe: All who purchaſe *Benefices at* Rome, *are guilty of Treaſon* *.

Par. 12. Act 146. *K. C. II. Par. 3. Act 73. *K. J. VI. Par. 11. Act 49. †K. J. VI. Par. 14. Act 120. *K. J. V. Act 175. †K. J. VI. Par. 8. Act 69.

7. No Crime can be purſued againſt a Man or his Heirs after his Death; except that *Treaſon* which is committed againſt the *King's Perſon* or *Common-wealth*.

8. A *Traitor* being forfaulted, not only all the Lands he holds of the King, but all the Lands he holds of any other Superior fall to the King; becauſe the Crime is committed againſt him. But becauſe the King cannot hold Lands of any other Superior, therefore he does, by a Letter of Preſentation under the *Quarter Seal*, preſent a Donatar to the Superior, who is to be Vaſſal to the Superior, in place of the Perſon forfaulted. And this Method of Preſentation the King uſes alſo in the Caſes of Baſtardy and *Ultimus Hæres*.

9. Not only the Lands diſponed to the Perſon forfaulted, but all the Lands diſponed to Sub-vaſſals, who are not confirmed, fall to the King; for the Lands return

return to the King in the same Condition Tit. 4.
they were disponed by his Majesty, or his
Predecessors, without being burdened with
any Right except these to which he has
consented (a). Nor, is the King oblig'd to

(a) See Book II. Tit. 5. § 30. with the Notes.
The Convention of Estates in *April* 1689. among the Grievances of the Kingdom, which wanted to be redrest in Parliament, point at Forfaultures in Prejudice of Vassals, Creditors, and Heirs of Intail, for remedying whereof, and that the Innocent may not suffer for the Guilty.

By *Act* 33. *Par. July* 1690. it is statuted, 'That 'no Forfaulture shall prejudge Tacksmen, Creditors, Superiors, Vassals, or Heirs of Entail 'aftermentioned, nor Husbands or Wives of the 'Persons forfeited; but that all Tacks cled with 'Possession, before committing of the Treason, 'where the Treason is open and notour, or before the Citation in the Process of Forfeiture, 'where the Treason is latent, shall defend against 'the Forfeiture of the Setter, his Heirs and Successors, the Debts being alway upon Record, 'by being Registrate, or Diligence done thereupon.

'That all Estates forfeited shall be subject to 'all real Actions and Claims against the same, 'tho' they be not raised nor insisted in within 'the five Years preceeding the Forfeiture; and 'that notwithstanding of the 2d Act of the 9th 'Parl. K. Ja. VI. which is thereby in so far rescinded.

'That Estates forfeited shall be subject to all 'Creditors personal or real, for their principal 'Sums allenarly, whose Debts and Claims are 'contracted, and founded prior to the committing of the Treason, where the Treason is

'open

acknowledge Tacks, though made and cloathed with Poſſeſſion before committing of the Crime, except the Tack be ſet for a ſuitable Tack-duty. The King is obliged to pay no Debt, though contracted

open and notour; or prior to the Citation, whereupon the Forfeiture proceeds, where the Treaſon is latent; excepting, nevertheleſs, ſuch Debts as are, or ſhall be contracted, during the open Rebellion, and riſing in Arms; which Debts, ſhall be in the ſame Caſe as before that Act: And that forfeited Eſtates ſhall likewiſe be ſubject and liable to all the Caſualities due to the Superior, either before the Forfeiture, or thereafter by opening the Fie, and that in the ſame Way, as if theſe Tacks had been ſet, Actions raiſed, Debts contracted, and Caſualities due, and all confirmed under the Great Seal, before committing of the Crime, for which the Forfeiture is deduced.

That no Heirs of Entail in Infeftments, or other Deeds affected with prohibitive or irritant Clauſes, in Caſe of Contravention of the Proviſions therein mentioned, ſhall be prejudged by the Forfeiture of his Predeceſſor; but only in ſo far, as the Party forfeited had Liberty to contract Debt, or, by the Quality of the Right to affect the Lands, and in as far, as the ſame ſtands unexerced the Time of committing the Treaſon, ſhall only have Right to affect the ſame, as the Party forfeited might have done, provided, the Tailzie be regiſtrate, conform to Act of Parliament, 1685. And that the Deed, whereby the foreſaid Faculty is exerced, be inſert in ſome publick Regiſter, or contained in a Contract of Marriage. Likeas, that Clauſe in the

Act

ed for onerous Cauſes, before the committing of the Crime, except the Creditor have a real Security, therefore confirmed before the Crime was committed. Tit. 4.

10. The other capital Crimes are, *Blaſphemy*, *Man-ſlaughter*, or *Homicide*; for all Homicide is Capital with us, except it be Caſual *, or *Homicide in Self-defence*. * K. C. II. Par. 1. Seſſ. 1. Act 22.

11. * Theft is puniſhable by Death; but we call ſmall Theft *Pickery*, and it is only puniſhable arbitrarily *. + K. J. I. Act 137. and 14. * K. J. III. Act 60.

12. Notour *Adultery*, that is to ſay, *where there are Children one or moe procreated between the Adulterers, or where the Adulterers converſe openly at Bed and Board, or being diſcharged by the Church to converſe, do continue to converſe, is puniſhable by Death* †; *but ſimple Adultery is only puniſhable arbitrarily. Inceſt* *, *Buggery*, *Duels* + Q. M. Act 74. * K. J. VI. Par. 6. Act 105. † K. J. VI. Par. 1. Act 14.

' Act 22d, concerning Tailzies, Parl. 1685. Declaring the Sovereign ſhould not be prejudged by that Act, with Reſpect to Confiſcations or Fines, as Puniſhments of Crimes, is reſcinded. It is likewiſe by the ſaid Act 33. Parl. 1690, ſtatuted and ordained, ' That no Wife ſhall, by the ' Forfeiture of her Husband, be prejudged of her ' Terce of Lands, nor of any Obligements conceived in her Favours, by her Contract of Marriage: Nor no Husband ſhall, by the Forfeiture ' of his Wife, be prejudged in the Courteſy of ' Lands belonging to his Wife, nor any Obligements in his Contract of Marriage conceived in ' his Favours; but that the ſaids Rights and Obligements, both as to Husband and Wife, ſhall have their full Force and Effect, immediately ' upon the Diſſolution of the Marriage.

Book IV. Duels †, the invading of any of His Majesty's Officers, for doing His Majesty's Service *; Forgery †, Witchcraft, and the Consulters of Witches *; Sorners, that is to say, such as masterfully take Meat and Drink from the King's People without Payment †: All wilful Hearers of Mass *, and Concealers of the same: Mutiliation †, which is the disabling of a Member, though, *de praxi*, this be ordinarily punished with an arbitrary Punishment: Or the Authors of *Infamous Libels, Seditious Speeches, tending to Sedition*; the Strikers of any Judge in Judgment; Mixers of Wine *, and Committers of Hamesucken, by which we understand the assaulting or beating any Man in his House (b).

* K. J. VI. Par. 16. Act 12. † K. J. VI. Par. 16. Act 4. * K. J. V. Act 8. † Q. M. Act 22. * Q. M. Act 73. † K. Ja. I. Act 5. 7. * K. J. III. Act 75. † K. J. VI. Par. 14 Act 193. * K. J. VI. Par. 6. Act 76. † K. J. III. Act 89. † K. Ja. I. Act 19. * K. Ja. I. Act 1. Act 16. Act 10.

13. The Crimes to be pecunially punished, are, the *Slayers of Red-Fish* †, *Killers of Daes, Deer, Roes* *; *Destroyers of Bee-hives, Fruit-trees, Green-wood*; *Kindlers of Mure-burn* from the last of *March* till *Michaelmas*; *Steeping of green Lint in running Waters, or Lochs*; such as are guilty of *abominable Oaths, and Fornication* †.

14. Crimes to be arbitrarily punished at the Discretion of the Judge, are, *Negligense in the King's Judges and Officers* *; *and such as unjustly murmur against them* †, *Breakers of the King's Protection* *, *the bring-*

(b) See our Author's Treatise of the Laws and Customs of *Scotland*, in Matters Criminal, Tit. 17. *Adultery*, § 3.

bringing home of Erroneous Books ‡, *and the Troublers of Church-men, Crafts men who wrongously refuse to fulfill the Work which they have taken in hand* *; *verbal Injuries and Scandals against private Parties* (*c*).

15. It is fit to know, that no Punishment left Arbitrary by the Law to the Discretion of the Judge, can be by him extended to Death; and that wherever the Law appoints Death to be inflicted, the Offender's Moveables fall to the King, tho' the Law does not express the same, and tho' the Sentence express not the Confiscation.

16. There are other Crimes, whereof the Punishment is not reducible to any of these Kinds; and thus *Perjury* and *Bigamy*, (which is a Kind of Perjury, because a Man who *marries two Wives, breaks his Matrimonial Oath*) are punishable by *Confiscation* * *of all the Offenders moveable Goods, Imprisonment and Infamy.*

17. Defor-

‡ K. Ja. I. Act 79.
* K. Ja. IV. Act 104.
† K. Ja. I. Act 1535.
* K. Ja. VI. Par. 7. Act 106.
† K. Ja. I. Act 80.
K. Ja. V. Act 111.
* Q. M. Act 19.

(*c*) By Act 5th, *Parl.* 1696. it is statuted, 'That 'if any Person shall defraud his Creditors, and 'shall be found, by Sentence of the Lords, to 'be a fraudulent Bankrupt: The Degree of his 'Fraud, being by the same Sentence determined, That the Person guilty, shall not only be 'holden infamous, *infamia Juris*; but shall also be punished by Banishment, or otherwise, '(Death excepted) as the laids Lords shall see 'Cause.

Book IV.

*K. J. VI. Par. 7. Act 118. Par. 12. Act 150. † Ib. Act 48.

17. DEFORCERS of Meſſengers, and breakers of Arreſtments, are puniſhable by *Confiſcation of all their Moveables* *; *Foreſtallers of Markets* †, by buying Things before they be preſented to the Market, or before the Market be proclaimed, are puniſhable by Impriſonment, and Confiſcation of what is bought.

*K. J. VI. Par. 11. Act 52. Par. 14. Act 222. Par. 15. Act 257. †K. J. V. Act 15.

18. OCKER, or *Uſury* *, which is the taking more than the Annualrent allowed, or the taking Annualrent before the Term of Payment, is puniſhed by Eſcheat of Moveables, and by the Loſs of the principal Sum; for the Debitor is to be free from the Obligation, and the Writ being reduced, the Sum belongs to His Majeſty.

K. Ja. VI. Par. 12. Act 141.

19. STELLIONAT, or the making of double Rights, is puniſhed by Infamy †, and their Perſons are at the King's Will.

*K. J. II. Act 22.

20. THE Keepers of Victual to a Dearth, are puniſhable, as * *Ockerers*; and by the Civil Law, *per Leg. Jul. de Annona.*

K. J. VI. Par. 6. Act 93.

Bribing of Judges is puniſhable by Infamy and Deprivation. *Plagium*, or the *ſtealing of Men*, is a particular Crime by the Civil Law; but is a Species of Theft with us.

†K J. VI. Par. 13. Act 137. *K. J. VI. Par. 1. Act 2. Par. 6. Act 72.

And *Theftboot*, which is the ſaving a Thief by fining with him, is puniſhable as *Theft* †. *Baratry*, or the obtaining Benefices from *Rome*, is puniſhable by * Baniſhment and Infamy. *Ambitus*, or the obtaining Offices by unjuſt Means, is not puniſhable under Monarchy.

21 BY

21. By our Law, when the Purſuer raiſes a *Criminal Summons*, he muſt find Caution to Report the *Criminal Letters indors'd and execute*; and the Cautioner muſt either enact himſelf in the Books of *Adjournal*, (for ſo we call the Regiſters of the *Juſticiary*) if he be preſent; or he muſt ſend a Band to be Regiſtrate there, if he be abſent, under the Pains contained in the Act of Parliament*: And the Defender is by the Letters commanded to find Caution in the ſaids Books, within ſix Days after the ſaids Letters are execute againſt him; which finding of Caution, he muſt intimate to the Meſſenger who cites him, elſe that Meſſenger may denounce him for not finding Caution. Tit. 43

*K. J. V. Act 34.

22. The Defender, in all Crimes, is allowed to have *Letters of Exculpation*, for leading Witneſſes for proving of his own Innocency, which he muſt Raiſe and Execute againſt the Day of Compearance, to which he himſelf is cited; for all Diets in Criminal Courts are peremptor. And there are no Diets allowed for further Probation, either to Purſuer or Defender.

23. All Probation in Criminal Cauſes muſt be very convincing and clear, becauſe of the Severity of the Concluſion: But ſometimes Witneſſes, otherwiſe *inhabile*, are allowed, becauſe of the Danger of the Common-wealth, as in Treaſon,

son, or because the Crime cannot be otherwise proven, as in *Hamesucken*.

24. The Justices are the only Judges to all Points of Relevancies, and even to the Objections against the Witnesses; and they remit to an *Inquest* of 15 Men chosen out of 45, to judge what is proven: And this *Inquest* may Condemn upon their own Knowledge, they being in our Law, both Judges and Witnesses: And if they Condemn, *Their Verdict* (for so their Sentence is called) cannot be quarrelled, nor they for Condemning; but if they Absolve after clear Probation led, they may be punished with Infamy, and Confiscation of Moveables (*d*).

25. The Punishment of Crimes is taken off, either by *Remission*, which must pass the *Great Seal*, and must express the greatest Crimes, for which the *Remission* is granted; or by *Indemnity*, which is a *General Remission* granted by the King and Parliament; betwixt which two there is this Difference, That the obtaining a *Remission* does not free the Obtainer † from *assything the Party* (that is to say, *from repairing his Losses*) *since 'tis presumed, the King does only discharge what belonged to him*, which is, *Vindicta publica*; but not what

[K. J. II. Act 62.]

[† K. J. II. Act 74. K. J. V. Act 7.]

(*d*) The Convention of Estates in *April* 1689, among the Articles of Grievances, enumerate Affies of Error; But there is not an Act of Parliament made for redressing it.

what is the Interest of private Parties, or Tit. 4. *Vindicta Privata*: But because all the People are represented in Parliament, the King and Parliament may, by their *Indemnity*, discharge both the one and the other.

26. He who founds on a *Remission*, acknowledges the Crime; but he who founds on an *Indemnity*, does not.

27. The King likewise restores Men sometimes against *Forfaultures*; which *Restitution* is either by Way of *Justice* (e), *finding that the Person was unjustly condemned*, and then the Person condemned is restored to all that ever he had; and he recovers not only his Fame, but his Estate, though transmitted to third Parties *, Or, *Secundo*, The *Restitution is by way of Grace and meer Favour*; and then the Party condemned cannot recover what was bestowed by the King upon third Parties; for the King cannot recal what was once legally and warrantably granted to him.

* K. Jam. VI. Par. 8. Act 4.

(e) Restitution *per modum Justitiæ*, is done either in Parliament, if the Person was condemned there; or, if he was forfeited by the Lords of Justiciary, by a Review in the Justice Court, or also, before the Parliament.

FINIS

English Words equipollent to some of the *Scots* Law Words in the foregoing Treatise.

A.

Accress,	Accrue,
Acted in Books,	Enrolled or Registred.
Addebted,	Owing.
Adminicles,	Proofs or Supporters.
Advert,	Take heed.
Advocate,	Counsellor at Law.
Aliment,	Maintenance.
To Aliment,	To maintain, or diet.
Annualrent,	Interest.
Appearand,	Apparent.
Apprising,	The adjudging of an Estate to pay Debts.
Ascrive,	Ascribe.
Assoilzied,	Acquitted.
Avail,	Value.

B.

Backband,	Counterband.
Baillie,	Bailiff.
Bairns,	Children.
Bairns Part of Gear,	A Child's Portion.
Band,	Bond.
Bloodwits,	Drawing of Blood in Quarrels.
Boll,	Four Bushels.
Bruik,	Enjoy.

Bursers,

Bursers,	Poor Scholars.
Bygone,	Bypast.

C.

Caption,	A Writ for taking a Man.
Casualities,	Rights or Perquisites, due to those of whom Lands are held.
Caution,	Security.
Cautioner,	Bondsman.
Cedent,	He that makes a Grant.
Chamberlain,	Steward.
Chamberlain-Court,	Steward's Court.
Chancellary,	Chancery.
Coalheugh,	Coal-Mine.
Cognition,	Cognizance.
Cognosce upon	Take Cognizance of.
College of Justice,	Inns of Court.
Collusion,	Underhand Agreement.
Commissar,	Official, or he who holds Bishops Courts.
Compears,	Appears.
Conductor,	Farmer.
Conquest,	Purchas'd.
Consignator,	A Consigner, he that consigns.
Crop,	Corn.

D.

Daes,	Does.
Decerned,	Decreed, or Impower'd.
Declarator,	A Sort of Declaration in Law.
Decreet,	Decree or Sentence.
Deforce,	To oblige one to desist by Force.

Defunct, Deceasd.
Denuded, Divested.
Deputes, Deputies.
Defuetude, Disuse.
Dies, Time of Appearance before a Court.
Diligence, Putting of a legal Sentence in Execution.
Discontigue, Separated.
Dispon'd, Assign'd.
Distrainzie, Distress.
Divot, Green Turf for covering Houses.
Dole, Deceit.
Donator, Donor.
Doted, Endowed.

E.

Effeiring, Conform or proportionable.
Esse, An Addition.
Elicster, Solicitor or Procurer.
Emption, Buying.
Enormly, Irregularly, Exceedingly.
Escheat, Forfeiture.
Evict, Affect or destroy.
Evidents, Evidences.
Evite, Avoid.
Excambion, Exchange of one Thing for another.
Exercel, Exercise.

F.

Failzieing, Failing.
Fang, Taken in the Fact.

Feal,

Feal, Green Turf for Hedging or Inclosures.
Bear of War, Warlike Posture.
To Fence a Court, To hold a Court in the usual Formalities, as in the King's Name, &c.
Farm, Corn or Meal paid to the Landlord for Rent.
Fisk, Exchequer.
Foggage, Grass which grows after the mowing of Hay.
Forefaulture, Forfeiture.
Fortalice, A small Fort.
Fray, False Alarm or Tumult.

G.

Glebe, Land belonging to the Minister of each Parish.
Goods, Cattle.

H.

Habile, Able.
Heritable, Hereditary.
Heretor, Freeholder.
Heretrix, Heiress.
Heritage, Inheritance.
Host, Army.
Horning, Outlawry.
Hounding out, Setting on.

I.

Idiot, Fool.
Impestable, Not to be performed.
Infeft, Having a legal Right.
Intented, Formed.
Interdiction, A divesting one of his Power.

Intromitters,	Those who intermiddle.
Intromission,	Intermeddling.
Intuitu,	With Regard or Respect to.
Joysing,	Enjoying.
Justice General,	Lord Chief Justice.

K.

Kenned,	Known.
Kiln'd,	The drying of Corn on a Kiln.

L.

Lawborrows,	A binding to the Peace.
Les'd,	Injur'd.
Leal,	Honest.
Legatar,	Legatee.
Libel,	Indite or Indictment.
He Libels,	He informs, or says.
Liferent,	An Annuity for Life.
Lint,	Flax.
Liquid,	Fix'd, ascertain'd.
Loches,	Lakes.
Lords of Session,	Judges.

M.

Malversation,	Misbehaviour.
Manse,	Minister's House Rent.
Mail,	Regulated, ascertained.
Modified,	Heath.
Moor,	Toll paid for grinding to the Miller.
Multure,	Burning of Heath.
Mureburn,	

N.

Nimious,	Too much.
Notar,	Notary.

Notour,

Notour,	Known.

O.

Onerous,	Weighty.
Owand,	Owing.

P.

Peremptor,	Peremptory, fix'd.
Plenishing,	Houshold Furniture.
Poynding,	Distraining or Seizing.
Prescrive,	Prescribe.
Procedure,	Procedure, Process, or Trial at Law.
Process,	Law-suit.
Propone,	Propose.
Pupils,	Minors.

R.

Rate,	A Proportion.
Recognosce to a Superior,	Return to a Superior.
Regality,	Royalty.
Relaxation,	Releasing or Acquitting.
Relevancies,	Sufficiency, Satisfactory.
Relevant,	Sufficient.
Relict,	Widow.
Repledge,	Replevy.
Repone,	Restore.
Reprobate,	Reject or Condemn.
Resile,	Retract or go back from.
Restand,	Resting.
Rouped,	Sold by way of Auction.
Rowming,	Assigning of a place for Cattle to feed on.

S.

Session, Term.
Signet, King's Seal.
Skaithless, Free from Damage.
Sowm, A Horse or Cow's Grass.
Spendthrift, An ill Husband, a Prodigal.
Spuilzie, Waste or Devastation.
Stipend, Benefice.
Subscrive, Subscribe or Sign.
Summar, Short, or without the usual Form of Law.
Summonses, Summons.
Three Sums, Three Days.

T.

Tabled, Laid before.
Taciturnity, Silence.
Tack, Leases.
Tacksman, Lessee.
Tailzie, Entail.
Teind-Barley, Tithe Barley,
Teinds, Tithes.
Testament, Will.
Thesaurer, Treasurer.
Thesaurary, Treasury.
Thirl, To be obliged to grind at such or such a Mill.
Thirlage, Such an Obligation.
Tholing, Enduring.
Tocher, Wife's Portion.
Transumpts, Transcripts.
Tutor, Guardian.

V.

V

Aik, Is Vacant.
Vaſſal, One who holds Land from a Superior in Feu, or on Condition of ſuch and ſuch Services.

Vendition, Selling.
Victual, Corn, Meat, and Malt.
Uplift, Collect.

W.

W

Adſet, Wadſet, Mortgage.
Wrongous, Wrongful.

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